NAVAL WARFARE: DUTIES OWED TO WAR VICTIMS

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A THESIS
PRESENTED TO
THE FACULTY OF
THE NATIONAL LAW CENTER
OF THE GEORGE WASHINGTON UNIVERSITY IN PARTIAL SATISFACTION
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN PUBLIC INTERNATIONAL
AND COMPARATIVE LAW

THESIS DIRECTED BY
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AUGUST 1970

135843

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I. PURPOSE AND SCOPE OF STUDY

"The right of belligerents
to adopt means of injuring
the enemy is not unlimited."

——Hague Convention No. IV[1]

Does law have anything to do with war and war with law? Many individuals believe that the term "war" connotes an abandonment of basic rules of behavior by substituting in their place reliance on force; while law implies a system where human behavior, relationships, and values are governed by inescapable rules. It comes as a surprise to many people to learn that there is an international law of war. This body of law attempts to impose minimum restraints upon international violence in the interest of the world community. The question, which asks the relationship of law to war and war to law, is not just academic, but of substantive and vital importance, to every military commander, as a violator of the laws of war may, depending upon the factual situation, be tried by the enemy, his own state, or by an international tribunal.

The purpose of this study is to analyze and discuss some of the major juridical issues relating to the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea (Sea Convention).[2] This Convention is of great importance and significance and represents a great step forward in the development of the law of naval warfare. The writer hopes that this paper will perform an informative function in assisting naval personnel in better understanding of the laws of war in general and in particular the Sea Convention, its humanitarian considerations, and its relationship to the three other Geneva Conventions for Protection of War Victims of 1949.

II. CLAIMS LIMITING NAVAL WARFARE: ORIGIN AND PROGRESSIVE DEVELOPMENT

A. HUMANITARIAN CONCEPTS:

Over the ages three basic principles have evolved which are often referred to as the foundation of the contemporary rules of civilized warfare. They are humanity, military necessity, and chivalry. It is the writer's opinion that humanity is the most important of these principles. Professor Mallison, Professor of Law at George Washington University, has written that, "Humanitarian considerations and acts must be encouraged in every practical way even though they have had a secondary role to military necessity in combat situations."[3] It cannot be over emphasized that humanity is the basis for many of the present prohibitions imposed on belligerents for the purpose of restraining the use of unnecessary violence in conducting war.

Accordingly, military necessity is not an all encompassing, permissive principle. It permits a belligerent to apply only that amount of force, not otherwise prohibited by the law of war, required for a partial or complete submission of the enemy with the least expenditure of time, life, and physical resources.[4] The rules of international law and in particular the principle of humanity is superior to military necessity -- military necessity is not a defense for lawlessness in the conduct of war. The concept of military necessity may and is often times restricted in its application by rules of law. The position that the laws of war are subject to, and limited by, the operation of the principle of military necessity has not been widely accepted for many years, in fact one of the War Crimes Tribunals' following World War II in rejecting this

argument stated that: "To claim that they (customary rules of war) can be wantonly - and at the sole discretion of any one belligerent - disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."[5]

The two principles, humanity and military necessity, may be described as complementing each other, not opposing. The principle of military necessity implies the principle of humanity which disallows any kind or degree of force not essential to obtain the objective sought; that is force which needlessly or unnecessarily causes or aggravates both human suffering and physical destruction. It is suggested that the two principles be thought of as elements of a "Larger composite practice which comprises both military necessity and humanity."[6]

The principle of chivalry is sometimes included as one of the basic principles of the law of war even though it appears to be a relic of the Middle Ages when combat was often times regulated by formalistic rules. In general, this principle prohibits the employment of treacherous means or expedients, such as the improper use of a truce flag.[7] However, chivalry should not be confused with stratagems or ruses of war which are lawful.[8] An example of a legitimate ruse would be for a warship to use false colors, disguise her outward appearance and even pose as a merchant ship, however, in such cases and prior to opening fire the proper naval ensign must be hoisted.[9] In contrast to ships which may fly a false flag, the attitudes and practices of belligerents during World War I and II indicate that military aircraft may not use false markings to deceive the enemy.[10]

Even though stratagems and ruses are legal, it it noted that a warship may not improperly employ the red cross emblem (or other distinctive protective emblems) which is used to indicate hospital craft, medical aircraft, medical units, and medical personnel and materials.[11] It is a violation of the Sea Convention to use ships and aircraft which are protected by one of the protective emblems for any military purpose.[12] As it is unlawful to wrongfully employ the red cross emblem, it is equally unlawful for ships to transmit false distress signals and distress messages which are indispensable to the safety of navigation which is necessary for preventing the collision, stranding or loss of ships or aircraft.[13]

It is submitted that in contemporary warfare the principle of chivalry has merged with the principle of humanity. As in modern warfare the principle of chivalry is largely the application of the humanitarian concepts of fairplay; and the refraining from the use of dishonorable means, expedients or conduct between opposing forces.[14]

For a full understanding of the many contemporary problems relating to the law of war as it pertains to the humane treatment of war victims background knowledge of the past is essential. History has established precedents which provide the knowledge necessary to shed light on preparation for the future.

War has constantly occupied the activity of man throughout his tenure on this planet. Thus, it is not surprising that over the centuries a considerable amount of law has evolved around the subject. However, for many centuries war was governed only by the law of the jungle, that is by no law at all as the concept of law is thought of in the contemporary science

of jurisprudence. As civilization developed so did the methods of conducting war; war became more destructive and deadly.

1. From the Beginning of Time: Pre-19th Century Developments

In antiquity, war was waged with all the cruelty of which human fiendishness is capable. Primitive man and his barbarian descendent annihilated or enslaved all foeman who were captured or left injured or weaponless on the field of battle. In time it became the practice of the conqueror to hold a captured headman or leader as a hostage for ransom. Such a victim was Lot. According to Scripture, he was freed by the forces of Abraham - perhaps the earliest prisoner-rescue on record.[15]

Generally, it can be said that the vanquished of the ancient world usually faced extermination. One finds in Samuel: "Thus saith the Lord of Hosts...go and smite Amalek and utterly destroy all they have, and spare them not."[16] Saul was considered disobedient because he took a few Amlekite prisoners.[17] Six centuries later Hemocritus of Syracuse was exiled for refusing to slaughter all Athenian captives. During antiquity, there were some members of mankind who had a conscience and provided humane treatment to captives, an example was India where the ancient Codes of Manu (about 200 B. C.) enjoined Hindu warriors from doing injury to any defenseless or subdued enemy.[18] There are of course other specific examples of particular leaders or nations extending basic humanitarian principles to enemy war victims. This was the exception rather than the general practice, however.

The Romans sported with their war-prisoners, often using them for target practice or gladiatorial shows. Prisoners were tortured for public amusement. Enslaved enemy warriors rowed Caesar's naval galleys to North Africa and Britain, and were killed when they could no longer pull an oar. "Slay and slay on!" the Roman General Germanicus ordered his Rhineland invaders. "Do not take prisoners! We will have no peace until all are destroyed."[19] However, in time the Romans realized that the wanton slaughter of prisoners of war was an economic loss. Thus, not because of feelings of humanity or mercy, it became a wide spread practice that captives were placed in slavery.

As man and civilization developed so did man's method of conducting war. Warfare remained as destructive, but those who conducted war saw that there were advantages in observing some restraints provided the enemy did likewise.[20] The influence of Christianity and the development of the laws of chivalry led to changes and development of some concepts of humanity in the treatment of war victims by conquering nations.

Even though the Christian influence was important in the development of the laws of war, it in some aspects delayed the wide spread acceptance of universal rules of war. From the early 5th to 17th centuries much emphasis of Christian nations and writers was on the "just war" concept, "He who goes to war justly - that is to say with good cause and in accordance with morality - can do anything he pleases to nationals of the enemy country."[21] The end result was that each belligerent looked upon his cause to be the only one "just" and massacred at will.[22] Also Christianity had formulated the admirable doctrine of love for one's

fellow man, but that doctrine was often forgotten in wars between Christians and non-Christians. The doctrine was often deformed by men who viewed altruism as a way of ensuring their own salvation and applied its precepts only in wars with those of the same faith. In fact, all too often it was non-Christians in wars with Christians that displayed the most humanity.[23]

It was not until the Enlightenment that the "just war" concept lost its significance and humanitarianism really came into being. The Christian nations of the world began to realize that there were certain basic humanitarian principles which were binding on all belligerents regardless of the religion or nationality or the parties to the conflict, or to the cause responsible for the hostilities. As the principle of a "just war" began to fade into obscurity, the concept developed that, "War must be waged in a 'proper' way that useless suffering should be avoided."[24] However, it was not until the 17th century that the soldier found a notable spokesman in a Dutch lawyer, Hugo Grotius. Grotius attempted to devise a set of rules which combatant nations could follow to mutual advantage, however, his efforts to humanize warfare by legal means did not meet with immediate success.[25] But his efforts did plant the seed, publicize the problem and place it on humanity's conscience.

Once the principle of respect for the human person -- regard for his life, liberty, and happiness -- had been planted, belligerents began to enter into cartels[26] which pertained to the exchange of prisoners of war, armistices, capitulations for the surrender of fortresses, and the treatment of the wounded and sick. These agreements were generally of limited duration or applicable to a particular battle.

Even though Grotius and his disciples had introduced humanitarianism into international law, it remained for the 17th century philosophers Montesquieu and Rousseau to develop further humanitarian concepts as applied to the law of war. Rousseau wrote that:

> War is not a relationship between one man and another; but between one State and another, in war, individuals are enemies only by accident, not as men but as soldiers... Since the end of war is the destruction oftthe enemy State, one is entitled to kill its defenders so long as they bear arms; but as soon as they lay down their weapons or surrender...they become men once more, and one no longer has any right over their lives...[27]

As Montesquieu and Rousseau had laid the ground work it remained for events emerging from the American and French Revolutions to lead to pronounced and significant changes in the law of war. During the American Revolution, the British refused to treat captured American naval personnel as prisoners of war even though such status was accorded to captured members of the Continental Army.[28] After the revolution, the United States made an attempt to regulate the treatment of captured personnel by bilateral treaties with several countries.[29] These treaties laid down rules for the protection of prisoners and the sick and wounded, but these Conventions were merely agreements between two states and not an international treaty binding on other states. This was at most a piecemeal approach to a most pressing and difficult problem.

The French Legislative Assembly, in 1792, enacted a formal code of humanitarian principles governing the treatment of prisoners of war. This code provided in part that:

> (1) Prisoners of war are under the protection of the French Nation.
> (2) All cruel acts, all violence, and all insults committed against a prisoner of war shall be punished as if committed against a French citizen.
> (3) All prisoners of war shall be transported to special places in the rear of the army for which purpose the commanding generals shall have designated specific areas.[30]

2. Humanitarianism, Important In the Evolution of Conventional Law: Post 19th Century Developments

The French Code was ahead of the times[31] and was rejected by the other nations of the world. However, by the middle of the 19th century the nations of the world realized that maltreatment of prisoners of war and the sick and wounded was an anachronism that had to be abandoned. However, it was not until the Battle of Solferino in 1859 where 38,000 officers and men were wounded within a space of fifteen hours and the American Civil War where single engagements were producing casualties in excess of 20,000 men, that the humanitarian conscience of mankind was suddenly awakened to the great inadequacy of the existing law of war. During the American Civil War and other wars of Europe in the 1850's and

1860's many of the sick and wounded could have been saved by prompt medical care had it been available.[32]

It took awhile for the humanitarian conscience of mankind to be awakened, but once it had been awakened, individual nations, private individuals and international conferences attempted to establish procedures which would lessen the suffering of victims of war. The first major multilateral convention pertaining to the treatment of war victims whic became universal in character was the Convention for the Amelioration of the Condition of Soldiers Wounded in Armed Forces in the Field of 1864 (Convention of 1864).[33] It is surprising to note that this Convention was not applicable to naval warfare. In fact, throughout the evolution of the customary law of war, naval warfare seems to have been neglected. It would seem to this writer that the customary laws of war of the time which related to the protection of humanitarian values would have applied to hostilities at sea, however, such generally was not the case. Even in the development of the conventional law of war, naval warfare was generally neglected. It was not until after the Naval Battles of Lissa and Mobile Bay that it became tragically apparent that the lack of organized medical aid and standards of protection had caused the needless death of many combatants.[34] That in 1868, an international conference for the purpose of extending and adopting the Convention of 1864 to naval warfare was convened.[35] This conference drafted and approved fifteen articles, nine of which pertained to warfare at sea, which became known as the "Additional Articles of 1868."

The "Additional Articles" received favorable response from many nations and were acceded to by the United States and several other nations.[36]

However, the validity of the accessions was doubtful and the Swiss Government, the depository for the ratifications, never considered the "Additional Articles" as a treaty.[37] Even though the "Additional Articles" never achieved the status of a treaty, a number of countries including the United States, agreed to adopt and observe the, "Application on the seas of the humane principles laid down in the Geneva Convention" (referring to the Additional Articles),[38] during periods of hostilities.

Between 1868 and 1899 the matter of extending the principles of the Convention of 1864 to naval warfare was discussed and studied on several occasions by International Conferences of the Red Cross. However, it was not until 1899 at the First International Peace Conference, at the Hague, that the humanitarian principles of the Convention of 1864 were adapted to maritime warfare and incorporated in the Third Convention of the Hague of 1899 for the Adaptation to Maritime Warfare of the Principles of the 1864 Convention (Third Convention o 1899).[39] This Convention, which was ratified by a number of states, was a great improvement over the "Additional Articles" as it eliminated many ambiguities and clearly provided that all hospital ships were exempt from capture.[40]

The Third Convention was subsequently revised. The revision was entitled The Tenth Convention of the Hague of 1907 for the Adoption to Maritime Warfare of the Principles of the Geneva Convention (Tenth Convention).[41] This Convention consisted of 28 articles and was a vast improvement over the Third Convention as it was no longer modeled on the 1864 Convention, but on a revision of the 1864 Convention which had taken place in 1906 and which was much more sophisticated. An item of particular importance contained in the Tenth Convention, not included in the

Third Convention, was a requirement that signatories take the necessary steps, by way of their criminal law, to protect against individual acts of pillage and ill treatment against the sick and wounded.[42]

It is surprising to note that the delegates to the Hague Conferences of 1899 and 1907, which conferences were responsible for the drafting of the Third and Tenth Conventions, were not as concerned with humanitarian aspects or the permanent establishment of peace as they were concerned with the regulation of warfare. What humanitarian principles that were adopted by these conferences and incorporated into treaties were for the most part ancillary to the main motivation of the conference, which was the regulation and limitation of weapons, explosives, and warships.

The Tenth Convention was in force for both World Wars. However, by the time of World War I, the methods of naval warfare had changed so drastically that in many ways the Convention was obsolete. Unfortunately the framers of the Convention were unable to forsee the many technological advances that were to be made in naval warfare - the long range naval engagement, the increased capabilities and endurance of the submarine, and the airplane. The author's of the Third and Tenth Conventions drafted these treaties in accordance with 19th century naval action which was fought at close range with bloody carnage and the consequent need for rendering aid swiftly to the sick, wounded, and shipwrecked. The drafters had envisioned that hospital ships would accompany the fleet to sea and after an engagement would render aid to those in need. The framers of these Conventions believed that the consequences of naval warfare were confined to the combatants on either side and they alone needed protection.[44] It is true that prior to World War I the law of warfare -

including naval warfare - had developed a set of principles which because of humanitarian considerations, recognized that combatants and non-combatants formed two classes of persons entitled to different types of treatment at the hands of the armed forces of an enemy state. The civilian population and their private affairs were, in the ordinary course of events, relatively unaffected by the fact that their nation was at war, unless they were living where actual hostilities were taking place. Therefore, out of a consideration of humanity and since the civilian contribution to the war effort was indirect and less than total, it was considered as non-combatant and so long as it refrained from actively participating in hostilities, it was not made the object of direct attack. Included in the non-combatant category was the merchant marine. Although enemy merchant ships have always been subject to capture,[45] they were not objects of direct attack (unless there were exceptional circumstances), they could be destroyed after capture only if it was necessary and the passengers and crew had been safely provided for.[46]

Beginning with World War I, many new developments placed a great strain on established principles of naval warfare. The emergence of the concept of "total war" and the technological and tactical advancements which had been made in naval warfare created many new tensions and pressures which had not been contemplated by the drafters of the Tenth Convention.

The Allied Powers had a superiority of naval ships and weapons and for the most part had control of the seas. Because of the Allied naval superiority the Allies were able to control the flow of goods and materials destined for Germany by sea. However, even though the Central Powers had

little effective surface sea power, they did have a sizeable submarine force. In retaliation for British action in declaring the North Sea a military zone, and the laying of the North Sea Mine Barrage, the Central Powers declared the waters adjacent to the British Isles a war zone. The declaration was accompanied by a statement that enemy merchant ships would be attacked without warning in such areas.[47] German submarines were very active in the waters surrounding the British Isles and several merchant ships were attacked which resulted in great loss of life. Also several Allied hospital ships transporting the sick and wounded from a theater of war to a place of safety were attacked and sunk by submarines belonging to the Central Powers, resulting in great loss of life. The Allies, in order to protect their hospital and merchant ships from attack by submarines, provided such ships with military escorts.[48]

The Central Powers in response to claims that they were in violation of the laws of war in general and the Tenth Convention in particular, alleged that the policy of the Allies in intercepting neutral shipping destined for Germany was illegal; that the arming and convoying of merchant vessels changed the status of such vessels from non-combatants to combatants; that vessels navigating in a "war zone" have assumed the risk; and that hospital ships were being used to transport troops and munitions. The Central Powers also contended that a submarine was unable to avail itself of the opportunity to inspect merchant and hospital ships and that unrestricted submarine warfare was justified because of the accepted ruse of displaying false colors and other difficulties of identification of the true nationality of a merchant ship.[49]

During World War I the Central Powers had a smaller stake in the maintenance of the Tenth Convention and therefore interpreted it very narrowly.[50] It is also pointed out that the conduct of the Allies regarding the Convention was not always in compliance with its provisions. Generally, it can be said that in World War I, for all practical purposes, the humanitarian influence of the Tenth Convention was not great and basic humanitarian concepts which had taken so long to develop were dealt a serious setback.

During World War II the numerous belligerents made some humanitarian concessions in interpreting the Tenth Convention as it pertained to hospital ships. The Convention was interpreted so that a hospital ship could transport not only the sick and wounded of the armed forces and their dependents but also injured seamen. However, the protection of the Convention was not generally extended to sick and wounded civilians.[51] It would seem that as a matter of both logic and common humanity the protection of the Convention pertaining to hospital ships would have been extended to civilians.

Even though the belligerents in World War II made a gallant effort to honor the Tenth Convention in so far as it pertained to hospital ships, there were alleged violations of the Convention by both sides and several hospital ships were attacked. However, several of the attacks can be attributed to the fact that the ships were inadequately marked, even though marked in accordance with the requirementsoof the Convention. It is noted that the provisions of the Tenth Convention pertaining to markings of hospital ships were inadequate for the high level bomber or distant submarine.[52] There is little evidence to show that attacks on

hospital ships in World War II were other than accidental and the result of faulty recognition.

The effort of the belligerents in World War II to protect hospital ships is overshadowed by the unrestricted submarine warfare practiced by both sides.[53] The belligerents generally refrained from rescuing survivors of torpedoed ships. There are several reported instances that the crews of Japanese[54] and German[55] submarines went so far as to murder surviving crews of torpedoed ships. Generally, it can be said that the conduct of both sides regarding submarine warfare was a violation of the Tenth Convention which provided, in part, that "After every engagement... belligerents so far as military interest permit, shall take steps to look for the shipwrecked, sick, and wounded and to protect them against...ill treatment."[56] The phrase, "so far as military interest shall permit," was construed very broadly and for the most part seem to have been ignored.

B. GENEVA CONVENTIONS OF 1949

Prior to the inception of World War II, it was apparent that the existing customary and conventional law relating to war victims,wwas in many aspects deficient. After the end of World War I and prior to 1940, several international conferences had considered the existing law of war as it pertained to war victims. In 1929 some changes were made to the Convention concerned with the treatment of sick and wounded armed forces

on land.[57] However, the Tenth Convention which was in desperate need of revision remained unchanged. The Swiss Government called a Diplomatic Conference to be convened in 1940. Revision of the Tenth Convention and the preparation of a Convention which would guarantee basic humanitarian protections to civilians who became victims of war, were two of the matters to be considered by this conference. The conference was prevented from taking place because of the outbreak of World War II.[58]

In light of the experiences and suffering of the millions of war victims of World War II, the advancements made in warfare such as the atomic bomb, and the increased capability of naval and aerial warfare, and the widespread involvement of civilian population, the need was urgent, by the time hostilities had ended to revise the laws of war, especially those concerned with war victims. Prior to the cessation of hostilities, the International Committee of the Red Cross undertook the task of reviewing and revising the Tenth Convention and other Conventions relating to the laws of war. This Committee incorporated within its proposed draft, provisions protecting fundamental rights of war victims, whether civilian or military, in time of war or internal disturbance (civil war). The Committee produced four draft Conventions which were submitted to, and approved with certain amendments by, the Seventh International Red Cross Conference, which met in Stockholm in 1948. These drafts formed the working documents of a conference convened by the Swiss Government in 1949, for the Establishment of International Convention for the protection of War Victims (Geneva Conference of 1949).[59] The importance of the working documents was not only the thorough research which had gone into their preparation, but the underlying emphasis that nations had

a duty to establish Conventions and other procedures which would protect basic, fundamental human rights of individuals, in time of war.

The Geneva Conference of 1949 adopted four Conventions which subsequently have been acceded to or ratified by an overwhelming majority of nations.[60] The four Conventions are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949 (Land Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949 (Sea Convention); Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (P.O.W. Convention); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Civilian Convention).[61]

The Land, Sea, and P.O.W. Conventions are thorough revisions of earlier treaties.[62] The Civilian Convention is new and developed as a result of the bitter experience and treatment of millions of civilians in World War II. There are many similarities between the four Conventions, as the primary reason for each of these Conventions is the same -- protection of basic, fundamental rights of war victims.

The Sea Convention has developed considerably from the "Additional Articles of 1868" to the 28 articles of the Tenth Convention and to the 63 articles of the present Convention -- one less than the Land Convention, which is the traditional Geneva Convention. For the first time nearly all the provisions of the Land Convention have their counterpart in the Sea Convention and the order is the same. Thus, at last there is a true Sea Convention. The Sea Convention is not perfect -- gaps and imperfections do exist -- but as long as there is war, there will always

be gaps and imperfections, However, in this troubled world in which we live, the four Geneva Conventions are important and useful tools which can be employed to protect basic humanitarian values.

III. CLAIMS CONCERNING THE SEA CONVENTION

A. SIMILARITIES BETWEEN THE FOUR GENEVA CONVENTIONS

The multilateral lawmaking Geneva Conventions of 1949 are humanitarian in purpose and antiwar in philosophical predilection. The total number of articles in the Conventions is over 400. The articles vary from setting forth principles of great width to detailed prescriptions regulating the movement of prisoners of war and internees, to the issuance of soap and tobacco. A minimum humanitarian standard of conduct regarding the treatment of civilians and members of the armed forces who have become victims of war is set forth in the Conventions.

The Conventions are complimentary to each other. Their purpose is clear. They are designed to ensure to those persons of the armed forces placed hors de combat and to enemy or alien civilians in belligerent countries and to civilians in occupied territories, humane treatment without adverse distinction based on sex, race, religion, nationality or political belief.[63]

The Geneva Conventions were forged in the glow of the harsh experiences of World War II and substantially exhaust the modern law relating to war victims. As the Geneva Conference of 1949 lackedtthe power to revise any of the Hague Conventions other than the Tenth, it was impossible to weld into one composite convention four separate draft conventions each of which had a different ancestry. However, it is recognized that the four Geneva Conventions belong to a homogeneoues group, and the most striking evidence of this is the similarity of the Conventions and the number of common articles.[64] For the most part the common articles are expressed in identical language, except for slight adaptations

necessary for the particular convention in which it is found.

1. Respect for the Conventions

Article 1 of each of the Conventions provides that, "The contracting parties undertake to respect and to ensure respect for the present Convention in all circumstances." This preliminary article does not overlap with the effects of ratification of the Conventions. Instead it emphasizes that the failure of a belligerent to abide by the provisions of a Convention, to which it is a signatory, does not relieve other belligerents, who are also signatories, from the obligations set forth in the Convention. Accordingly, if a nation fails to abide by the terms of the Convention, other signatories, whether neutral, ally, or enemy have a duty to ensure that the lapsing nation honor the terms of the Convention.[65] The parties also undertake to respect and ensure respect for the Conventions in those conflicts in which one or more of the participants are not parties to the Conventions. In the latter circumstance the Conventions are binding only as to those parties who are signatories.[66] However, it has been suggested that the principles of the Geneva Convention require, at the very least, that a contracting power involved in a conflict with a non-contracting power initially act in accordance with the provisions of the Conventions, whose conduct may lead to the result that the non-contracting power may do likewise.[67] Other writers go one step further and state that the principles of the Geneva Conventions are binding on all parties, regardless of the fact they may or may not be a signatory. They contend that because of the overwhelming number of countries which

have signed the Conventions, the principles set forth in the Conventions have become a part of the customary international law and thus binding on all nations.

2 Application of the Conventions

The provisions concerning the situations to which the Conventions apply were drafted in very broad terms. The Conventions provide that they will apply in, "All cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them."[68] They even apply to partial or total occupation of the territory or territorial sea of a State, even if the occupation is not resisted.[69]

The Conventions make a distinction between conflicts of an international character and conflicts of an internal character (civil war and internal insurrection). The reasons for the distinction was based upon the traditional international law principle that one sovereign State should not become involved in the domestic affairs of another sovereign State. In recent years, however, there has been a general trend in the field of international law which recognizes that the, "Question of the observance of fundamental human rights has ceased to be one of exclusive jurisdiction of States."[70] Accordingly, the progressive drafters of the Convention incorporated within them a provision which provides that the signatories agree to protect certain fundamental rights in conflicts of an internal nature. Often referred to as a "Convention in Miniature,"[71]

article 3 of each of the Conventions provides that as to conflicts of an internal nature, individuals who have not taken part in the rebellion or who have laid down their weapons because of sickness, wounds, or captivity, shall be treated with humanity. Murder, mutilation, torture, taking of hostages, outrages upon personal dignity, the passing of sentence and the carrying out of executions without previous judgement by a regularly constituted court are also prohibited. Aside from these broad humanitarian concepts, the provisions of the Conventions do not apply to internal conflicts unless there is an agreement to the contrary between the government and rebel forces.[72]

The limited application of the Conventions to internal conflicts does not in any way confer recognition upon the rebels as a State or Government by either the legitimate government or outside States[73] and the rebels can be tried pursuant to the domestic criminal law if the rebellion should fail.[74] It is evident that the drafters attempted, by way of the Conventions, to bind rebels in an internal conflict, to protect basic humanitarian values, but the actual legal efficacy of binding insurgents not a party to the Conventions has been questioned as doubtful.[75] However, it is submitted that respect of humanitarian principles is not only incombent on States, but also on any persons actively involved in hostilities.

The problem that most often arises in connection with article 3 is what constitutes a conflict of an internal character which would bring into existence the operation of the article. Varying criteria were suggested during the debates on this article, but the drafters were unable to agree. However, the general consensus seems to have been that the article would not cover ordinary criminals and bandits employing armed

violence against the police forces of a legitimate government. Even though the Conventions are silent as to what constitutes an internal conflict, various authorities have suggested certain criteria which would be useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and shortlived insurrection. The criteria are as follows:

> 1. That the Party in revolt against the dejure government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
>
> 2. That the legal government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part ofthe national territory.
>
> 3. (a) That the dejure government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or
> (c) that it has accorded the insurgents recognition as belligerents for the purpose only of the...Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace or an act of aggression.
>
> 4. (a) That the insurgents have an organization purporting

> to have the characteristics of a State; and
> (b) that the insurgent civil authority exercise de facto authority over persons within a determinate territory; and
> (c) that the armed forces act under the direction of the organized civil authority and are prepared to observe the laws of war, and
> (d) that the insurgent civil authority agrees to be bound by the provisions of the Conventions.[76]

The incorporation of the humanitarian principles of article 3 in the Conventions constitutes a giant step forward in the evolution of the international law of war. It is unfortunate that the Conventions as a whole are not automatically applicable in conflicts of an internal nature, however, article 3 does establish a minimum standard which must be applied in such conflicts. Article 3, like the rest of the articles of the Conventions, is concerned primarily with the individuals and the physical and moral treatment which they as human beings are entitled. It does not affect the legal or political treatment which may occur as a result of their behavior.[77]

3. Renunciation of Conventions by Protected Persons

Persons protected by the Conventions, "May in no circumstances renounce in part or in entirety the rights secured to them by the...Convention..."[78] This provision was included to ensure to protected persons, in all cases, the protection of the Conventions until repatriated by

preventing a Detaining Power from exercising any pressure on war victims so as to induce them to renounce their rights under any of the Conventions.

The drafters of the Conventions recognized that an absolute prohibition against renunciation might entail harsh consequences for some persons. The absolute prohibition against renunciation was included to safeguard the interests of the majority, exceptions were specifically excluded as it was felt they would at once open a dangerous breach in the structure of the Conventions as it would be extremely difficult if not impossible to prove the existence of duress or pressure in any given fact situation. It was also felt that in time of war protected persons in enemy hands are not in possession of a sufficiently independent and objective state of mind to realize fully the implications of a renunciation of their rights.[79]

4. Role of the Protecting Powers in Enforcing the Conventions

One of the most important provisions contained in each of the Conventions is that which refers to the role of Protecting Powers. Each Convention provides that it, "Shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the parties to the conflict."[80] This is a command addressed to the parties to a conflict to accept the cooperation of a Protecting Power; if necessary the parties must demand the cooperation and aid of a State to act as Protecting Power.[81] A Protecting Power is a sovereign State which acts in a utilitarian and legal nature and is the chief instrument for the effective operation of the Conventions as its main

function is to assure protection of war victims by proper application of the Conventions.[82]

Belligerents are required to facilitate the proper functioning of a Protecting Power. Performance of the neutral States' function as a Protecting Power is exercised through diplomatic and consular staffs or through other persons specially appointed. All persons exercising these functions must be nationals of a neutral State, though not necessarily of the Protecting Power.

Specific duties of the representatives of a Protecting Power include hearing complaints by prisoners of war;[83] lending good offices in case of a dispute over the application of the Conventions' provisions;[84] transmitting prisoner of war information;[85] aiding correspondence pertaining to prisoners of war; supervision of the treatment given to the wounded, sick, and shipwrecked;[86] supervision of the rules regarding burial;[87] control and search of hospital ships;[88] supervision of the condition and treatment of religious, medical and hospital personnel in enemy hands and of the landing of such personnel;[89] and supervision of ships chartered for the conveyance of medical equipment.[90]

The Protecting Power has the obligation to remain neutral. It must never exceed or misuse its powers and must observe the requirements of security of the State wherein it functions. A belligerent may restrict temporarily the functions of a Protecting Power when such measures are necessitated by imperative military necessities. The activities may be restricted only as an exceptional, temporary and partial measure. Restrictions may not be total, but can apply only to those activities of the Protecting Power which come up against the military necessities in question.[91]

As has been previously discussed, supervision and the proper implementing of the Conventions depends mainly on action taken by the Protecting Power. During World War II many war victims had no Power entitled to defend their interests. In order to prevent this situation from arising in the future, there was incorporated within each of the Conventions a provision providing that if for any reason war victims are deprived of a Protecting Power, the Detaining Power has a duty to request either a neutral State or an impartial humanitarian organization to perform the functions of a Protecting Power. Should such measures prove inadequate, the Detaining Power then has a duty to request or at least accept the services of an impartial humanitarian organization which is equipped to assume and perform the humanitarian tasks usually carried out by a Protecting Power, but not, of course, its other duties.[92] The key here is that the impartial humanitarian organization will be performing the humanitarian tasks normally performed by a Protecting Power, but will not be undertaking the other functions performed by a Protecting Power. The humanitarian organization undertakes those activities which bring directly and immediately to the persons protected by the Conventions, the care which their condition demands.[93] Thus, such an organization does not act, as if it were an agent, but rather as a voluntary helper. This is of great importance to organizations such as the International Committee of the Red Cross as it safeguards the independence of the organization. Many organizations may be equipped to handle the humanitarian needs of war victims, but are unable to perform in the diplomatic and political arena as a State would be able to do.

5. Reprisals Against Protected Persons

Reprisals are a warning to an enemy in the form of retaliatory action to serve notice on a belligerent that it should desist from illegal acts of warfare and to comply with the laws of war. Reprisals are not employed for the purpose of indicating an abandonment of the laws of war but on the contrary are resorted to for purposes of enforcing compliance with the laws of war. In essence, reprisals constitute a form of payment in kind[94] and is a last resort to induce compliance with the civilized concepts of warfare. A reprisal should not be resorted to until all other efforts have failed. The final decision to resort to a reprisal must be made on the basis of both law and policy, for a reprisal is an act which would otherwise be unlawful. Since reprisals are designed to have a deterrent effect, they should be made public and announced as being reprisals. However, the resorting to reprisal action is fraught with danger, because if the reprisal is excessive, it may itself be a war crime.[95]

Reprisals need not conform to those complained of by the injured party, but should not be excessive or exceed the degree of violence committed by the offending belligerent.[96] It is submitted that when a State is confronted with an enemy which holds little respect for human rights and dignity and where the enemy has engaged in a long course of abuse and usurpation of rights, it is doubtful whether the carrying out of a reprisal would be of any value. Experience in past wars has shown that reprisals instead of compelling adherance to the law of war have often formed the pretext for their wholesale abandonment. Accordingly, only in exceedingly grave cases should there be a resort to reprisals.[97]

Since reprisals are carried out because the guilty parties among the enemy cannot be apprehended, tried, or punished, reprisals are usually taken against persons (reprisals also can be taken against property) who are themselves guilty of no offense. However, the Geneva Conventions have reduced significantly the individuals against whom reprisals may be legally directed. Pursuant to these Conventions, the categories of persons immune from reprisals include; the wounded, sick, and shipwrecked; the personnel of medical units, establishments, and hospital ships; chaplains; prisoners of war; enemy belligerents found in a belligerent's own territory; and inhabitants of areas occupied by an enemy belligerent. For all practical purposes the effect of the Conventions is that all persons who find themselves under the control orjurisdiction of an enemy belligerent are immune as targets of reprisal. Thus, persons whose usefulness as a basis of enemy power is precluded, or has been eliminated, cease to be legitimate objects of violence. Practically the only individuals who may still be the lawful subjects of reprisals are those on the high seas and in the enemy's own territory.[98]

A protected person s immunity from reprisal is very broad, as all types of reprisals are forbidden; however, moderate the deprivations involved. The Conventions also include within the prohibition reprisals in kind even when the prior illegal enemy act consisted of maltreatment or killing of protected persons.[99]

Reprisals are distinguished from retortion, retortion is retaliation for actions which may be objectionable, but never the less legally permissible. An example of what is not retaliation or a reprisal is set forth in the following illustration; Britain, during World War II in order to

prevent supplies from reaching Germany blockaded practically the entire coast of Europe and also renewed the navicerting system of [100] World War I. As a result of the British action, Germany declared the area around the British Isles a war zone and announced her intention of sinking all ships, enemy, neutral, merchant or war which ventured into the areas. The British measures establishing the blockade and contraband control, were enforced in a way that did not violate the laws of humanity, (some of the international laws pertaining to interfering with neutrals may have been violated) however, the German submarine and mine warfare, alleged to be reprisal for the British blockade, caused considerable loss of life and property to both belligerent and neutral shipping.[101] The German action against Britain was neither a retortion as the manner in which it was carried out was clearly illegal nor could the German action properly be considered a reprisal as it was not carried out for the purpose of inducing Britain to abide by the laws of war.

6. Breaches of the Conventions: Sanctions

It is not enough for a State to enact appropriate legislation; or ratify Conventions unless the provisions of the legislation and Conventions can be effectively applied and respected. Infringements must be clearly recognized and their perpetrators duly punished; furthermore; any breaches must be discontinued. In time of war, legal principles; especially today, when warfare can be particularly ruthless; are liable to be entirely disregarded. What may be termed humanitarian law is weakened by the fact it is part and parcel of the laws and customs of

warfare. However, there is one factor which tends to make up for this deficiency and which is inherent in so called humanitarian law and that is that, "The interests involved are not of an economic order, but of the highest moral significance - they concern the protection of the life and dignity of human beings."[102]

The Geneva Conventions contain provisions pertaining to two types of breaches; grave and those which are not grave. Even though the expression grave breaches is not exactly defined, each Convention does contain a list of acts which are regarded as grave breaches.[103] The provisions relating to grave breaches are particularly impressive as they set forth a list of serious breaches which strike at the very roots of humanity. The following matters are contained in each of the Conventions as constituting a grave breach: willful killing; torture or inhuman treatment, including biological experiments; and willfully causing suffering or injury. In addition the Land, Sea, and Civilian Conventions provide that extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, constitutes a grave offense. The P.O.W. and Civilian Conventions further provide that the taking of hostages, compelling of protected persons to serve in the armed forces of a hostile power, and the denying of protected persons a fair and regular trial constitutes grave breaches. Deportation, transfer, and unlawful confinement of protected persons are items incorporated within the Civilian Convention constituting a grave breach which is not present in the other Conventions.

The Conventions provide that signatories will, if necessary enact legislation to provide effective penal sanctions for persons committing or

ordering the commission of a grave breach. However, as to breaches other than grave, the Conventions do not require signatories to enact legislation, but to take only those measures necessary to ensure their suppression, such measures may be administrative or disciplinary.[104]

The war crimes trials have established that crimes against international law are committed by men, not by abstract entities and that punishing individuals is an effective method for enforcing the provisions of international law. If the war crimes trials are precedent, it is very clear that any person, at any level of the civilian or military hierarchy can be tried for an offense committed against protected persons. Accordingly, this principle was carried over into the Conventions, as they are directed not only to States, but also individuals. Furthermore, the Conventions provide that every party has a duty to search for, "Persons alleged to have committed or to have ordered to be committed...grave breaches,"[105] and if such a person is apprehended, the State in whose territory the apprehension is made may try the offender in its own courts. The Conventions do not attempt to provide for the trial of grave breaches by any international tribunal, but contemplate only trial and sentence by the courts of parties.[106] However, it is submitted that since such offenses are of such international notoriety and are established by international Conventions and custom, they could also be brought before an international tribunal.

If the State in whose territory the apprehension of a person accused of a grave breach is made, desires not to prosecute, "It may...in accordance with the provisions of its own legislation, hand such persons over

for trial to another High Contracting Party concerned, provided such... party has made out a prima facie case."[107] The reason for including such a provision in the Conventions was to deprive war criminals of a sanctuary in a neutral State; in World War I and earlier conflicts it was not unusual for accused war criminals to seek and receive asylum in a neutral State.[108] This provision to hand over an accused, if the Detaining Party does not try him, is so worded as to be virtually non-existent. Although the intention of the drafters may have been to create an obligation upon States to extradite war criminals, the Conventions as worded do not achieve this result.[109] The obligation of the Detaining Power is to hand over, "In accordance with the provisions of its own legislation." However, the Conventions contain no requirements that signatories enact extradition legislation. There is the further difficulty that certain of the listed grave breaches (deportation or transfer of protected persons) might, if a broad meaning is given to the term, be considered as political offenses which are not generally accepted as being extradictable.[110]

The Conventions in their treatment of grave breaches have in a sense established an international penal code by setting forth certain types of conduct which constitute international crimes. In a way, taking into consideration the universality of the Conventions, the law pertaining to grave breaches is analogous to the law of piracy[111] as the Conventions impose on all parties a duty to apprehend persons regardless of their nationality, accused of committing an offense which constitutes a grave breach.

7. Denunciation and Repudiation of the Conventions by Signatories

Parties to the Conventions are free to withdraw at any time. However, if the party withdrawing is involved in a conflict, the denunciation will not take effect until peace has been concluded and protected persons have been released and repatriated.[112]

Minor violations by a belligerent are not a sufficient cause to conclude that a repudiation of one or more of the Conventions has taken place. It is submitted, that where the violation by a belligerent, though of only a part of a Convention, destroys he fundamental objectives he Conventions were designed to achieve, a State may be entitled to consider that the Conventions have been repudiated in their entirety. For example, if a belligerent places prisoners of war in theffront lines of its forces in order to forestall an advance or forces them to engage in combat, the opposing State would undoubtedly be justified in considering this, ipso facto, a total repudiation of the Conventions.

In the event an opposing belligerent utterly refuses to abide by the provisions of the Conventions, a State may declare itself absolved of its obligations under the Conventions as it pertains to that belligerent. If a State does denunciate or repudiate the Conventions, it is still bound by the generally accepted humanitarian principles which have achieved the dignity of international law. The Conventions insofar as they express customary international law would continue to bind all parties.

3. Dissemination of the Conventions

States when they become parties to the Conventions undertake to respect and ensure respect for the Conventions in all circumstances. If the Conventions are to be honored and properly applied a thorough knowledge of their provisions is essential. One of the worst enemies of the Conventions is ignorance.[113] Each of the Convertions requires the signatories to include instruction as to their contents in all programs of military instruction and, if possible, in civilian programs of instruction. It is difficult to overstate the importance of this provision. Failure of nations to comply with this provision has resulted in some unfortunate incidents involving members of national contingents forming part of the United Nations Peacekeeping Forces in the Congo;[114] and of Allied and Communist Forces in Vietnam.

The Conventions have been in force as to the United States since February of 1956; yet, it wasn't until fairly recently, through news reports from Vietnam that the majority of the American general public even became vaguely aware of the existence and of some of the main provisions of these important international agreements. Even today, detailed knowledge of the provisions of the Conventions is limited to a relatively small group of international lawyers, law professors, and members of the International Committee of the Red Cross.[115] When one considers the substantive and procedural requirements set forth in the Conventions; the substantial part of the modern law of war represented by these Conventions; and the significance of the provisions pertaining to grave breaches, the provision requiring instruction is of paramount importance.[116]

If the Conventions are to succeed in preventing unnecessary suffering during hostilities, their provisions must be widely disseminated. Widespread instruction and distribution of the Conventions will not only facilitate their application in times of war, but will also spread the principles of humanity and may help to defelop a spirit of peace among nations.

B. DUTIES AND OBLIGATIONS OWED TO PROTECTED PERSONS UNDER THE SEA CONVENTION

The purpose of naval warfare is the same as land warfare, the overpowering of the enemy, However, as in land warfare, so in naval warfare not every practice capable of injuring enemy personnel in offense or defense is lawful. In regard to killing and wounding of enemy personnel in naval warfare, customary international law provides that only those persons may be killed or wounded who actively participate in hostilities or who resist capture. Professor Mallison, Professor of Law at George Washington University, has written that:

> A central objective of the laws of war is to reduce the destructiveness involved in military operations by providing...a minimum standard of protection to individuals...Individuals ...so protected comprise non-combatants and combatants...[117]

Accordingly, personnel disabled because of sickness or wounds and those who surrender are to be protected.[118]

While the customary international law was primarily concerned with members of the armed forces, the Geneva Conventions have extended protection to certain categories of civilians. The Sea Convention specifically applies to all members of an armed force and civilians considered assimilated into the armed forces. Civilians protected by the Convention are those individuals who are members of a crew or plane or ship; members of the merchant marine; journalist and war correspondents; contractors; members of service organizations such as the U.S.O. or Red Cross, which are concerned with the health and welfare of members of the armed forces; and members of volunteer militias, corps, or organized resistance movements. In order for members of a volunteer militia, corps, or resistance movement to come within the provisions of the Convention, the following criteria must be met:

> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sigh recognizable at a distance;
> (c) that of carrying arms openly; and
> (d) that of conducting their operations in accordance with the laws and customs of war.[119]

It is interesting to note that persons protected by the Sea Convention are substantially the same persons entitled to protection under the P.O.W. Convention.[120] The reason enumeration of protected persons was set forth in both Conventions was that the drafters envisioned the possibility that a State might be a party to one Convention and not the

other.[121] The practical importance of the similarity of provisiions in the two Conventions is that a wounded, sick, or shipwrecked person is to be cared for and protected; treatment, care and protection is emphasized rather than status.

The categories of persons protected by the Sea Convention are broad, it is also apparent from a study of the legislative history that many of the framers felt that interpretation of the Convention should be in a way which would require a belligerent to respect all wounded or shipwrecked persons, even if such individuals do not belong to any of the categories specifically specified as entitled to protection. In fact, one commentator writes that:

> In virtue of a humanitarian principle universally recognized in international law, of which the Geneva Conventions are merely the practical expression, any wounded, sick or shipwrecked person whatever-even a franc-tireur or a criminal - is entitled to respect and humane treatment and the care which his condition requires...(The Convention) cannot...in any way entitle a belligerent to refrain from respecting a wounded or shipwrecked person, or to deny him the requisite treatment, even where he does not belong to any of the categories (specifically specified in the Convention). Any wounded person, whoever he may be, must be treated by the enemy in accordance with...the .. Convention.[122]

A belligerent which is forced to abandon its wounded must, so far as the military situation permits, leave a part of its own medical personnel

and supplies to assist in their care.[123] In caring for the wounded and sick of both the enemy and a belligerent's own forces priority of medical treatment can be justified only on the grounds of medical urgency. Discrimination in treatment based upon sex, race, religion, nationality, political opinion or any other similar criteria is specifically prohibited. A medical facility which is crowded by an influx of wounded, both friendly and enemy, must give attention to those persons for whom delay might be fatal, afterwards proceeding to those patients whose condition was not such as to necessitate immediate attention.[124]

None of the Geneva Conventions define the terms "wounded" and "sick." However, it is generally agreed that these terms apply to those persons who have fallen by reason of a wound or sickness of any type, or who have ceased to fight and have laid down their weapons because of what they themselves think about their health. It is the laying down of weapons which constitutes the claim to protection. The combatant who seeks to kill may be killed, but the abandonment of combat should put an end to the fighting. There may be times when the obligation to cease hostilities cannot be respected. For example, an amphibious landing, it is not always possible to distinguish between an attacker trying to reach land and a soldier or sailor in danger of drowning. Similarly in the case of underwater demolition personnel it may not always be evident when they are in peril and need of assistance. However, in such instances, persons in distress who renounce active combat must be respected and rescued once their perilous position becomes known.[125]

The term "shipwrecked," as employed by the Convention is broadly construed.. The Convention is clear that the term means, "Shipwrecked

from any cause and includes forced landings at sea by or from aircraft."[126] The term includes air crewmen who parachute into sea, s well as personnel aboard planes and vessels which have made forced landings, as well as persons who are in need of assistance and care, who are refraining from hostile acts and who are in peril as a result of loss or damage to the craft on which they were aboard.[127] It is evident from the legislative history that the primary concern of the drafters was that the term "shipwrecked: be given a very broad interpretation so as to protect individuals at sea who were in need of assistance and help.

The basic concern of the Maritime Convention is personnel at sea. The Convention makes it clear that in a conflict between land and naval forces, it applies to forces at sea, once armed forces are put ashore they become subject to the Land Convention.[128] However, regardless of which Convention is applicable to a given fact situation, it is abundantly clear that the underlying humanitarian principles of the Geneva Conventions are always applicable and that individuals who become hors de combat are to be respected and protected.

1. Status of the Sick, Wounded or Shipwrecked in Enemy Hands

"The wounded, sick, and shipwrecked...who fall into enemy hands shall be prisoners of war..."[129] This provision defines the status of a wounded, sick or shipwrecked person who has come within the control and custody of the enemy. Such a person is at one and the same time a wounded, sick, shipwrecked person who is entitled to medical care and attention as if he were not an enemy, and a combatant who is a prisoner of war. A wounded

sick or shipwrecked person who falls into the hands of the enemy which is a party to both the Sea and P.O.W. Conventions will enjoy protection under both Conventions. The Sea Convention takes precedence over the P.O.W. Convention where the two overlap. The point regarding precedence is more academic than practical, since the protection accorded by the P.O.W. Convention is equivalent to that accorded by the Sea Convention. It is emphasized that the Sea Convention relates primarily to wounded, sick, and shipwrecked persons, in a temporary situation, where the principal concern is to rescue and tend the victims. The P.O.W. Convention applies fully in the following state, that of captivity on land when the Detaining Power must make the necessary arrangements for a prolonged detention.[130]

Enemy wounded, sick or shipwrecked personnel may be held aboard a warship only as a temporary measure pending transfer to land. The Maritime Convention does not provide guidance of a specific character for the treatment of prisoners of war while detained on board a warship. However, the Convention does provide that, "The provisions of international law concerning prisoners of war shall apply."[131] Accordingly, it is submitted that the general obligations laid down for the protection of prisoners of war in the P.O.W. Convention[132] must be complied with at least to the degree that those obligations are relevant to the circumstances pertaining to internment on blard belligerent warships. It is recognized that these provisions are of a very general character and consequently leave unanswered many questions that will arise in the course of operations at sea. Nevertheless, a belligerent must refrain from imposing unnecessary hardships upon prisoners of war interned on board its warship and from

subjecting such persons to unnecessary danger.[133]

There are several courses of action available to a belligerent holding on board its warship personnel of the opposing party. They are: transfer such persons to the territory of the Detaining State and intern them in a prisoner of war camp; land such persons in a neutral territory; or return such individuals to their home State.[134]

The landing of sick, wounded, or shipwrecked persons in a neutral country is subject to the consent of the authorities in the neutral State. A neutral State, even a signatory to the Geneva Conventions is not obliged to agree,[135] for in certain instances the accommodation of sick and wounded persons could place a heavy burdon on the neutral. If a foreign warship does land enemy personnel at a neutral port, the neutral must intern such personnel so as to prevent their return to their country and there again take part in operation of war. A neutral State may, with the consent of the belligerents, return interned individuals to their State.

A neutral State interning belligerent personnel has a duty to apply as a minimum standard the provisions of the Sea and P.O.W. Conventions in its dealings with interned persons.[136] The power upon whom the interned personnel are dependent is responsible to the neutral for the cost of internment.

The status of sick, wounded, and shipwrecked individuals aboard enemy hospital ship are not prisoners of war. It is unimportant how an individual got aboard a hospital ship. A hospital ship, even though it may be a commissioned ship of a State's naval forces, is not a warship, it is a charitable vessel considered non-hostile and may not commit an act of war. It is an act of war to capture enemy personnel or hold them

as prisoners of war. However, this is in no way prevents special security measures on hospital ships to protect the ship and crew from any person which might cause a disturbance or try to take over the ship.[137] It is the fact of being landed in enemy territory or being taken aboard a warship, and thus being taken over by enemy military authorities that constitutes capture.

If a man-of-war transfers enemy wounded, sick or shipwrecked personnel to a hospital ship of its own nationality, their prisoner of war status will be temporarily suspended; their fate will be determined by the country in which they are landed or by the nationality of a warship which takes them aboard. In the same way a merchant ship cannot confer the status of prisoner of war upon the sick, wounded or shipwrecked of a belligerent, which it may have rescued or picked up for it is not a warship even though it may be armed for purposes of self defense.[138]

2. Battle Casualties: A Duty to Search For

The basic underlying premise of the Sea Convention (that persons *hors de combat* must be respected and protected) obviously implies that such persons must be rescued from peril. However, to leave no doubt, the drafters incorporated within the Convention a provision which provides that, "After each engagement, parties to the conflict shall without delay...search for ...the wounded and sick, to protect them against pillage and ill treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled."[139] The reason for specifically including and emphasizing such an important provision is that diligent search and

swift treatment will save lives. The obligation to act is strict, it must be done without delay after every engagement, air or naval, The measures which may be employed to collect the wounded, sick, and shipwrecked are many and varied even if the assistance of civilian ships and rescue craft must be requested. A warship lacking the facilities to collect and care for the victims of an engagement must alert other ships in the area or provide the victims with the means to await rescue, such as providing life boats, food, water, compass and charts. It is submitted that rescue zones should be set up after a naval engagement. Such zones would permit the speedy rescue of persons hors de combat, by providing an area in which vessels and persons of all nationalities could engage in rescue operations without fear of attack. There is no doubt that the establishment of rescue zones would be in keeping with the humanitarian principles set forth in the Sea Convention.[140]

Even though the obligations to engage in rescue operations is strict, a belligerent may be justified in not engaging in rescue operations in a particular fact situation because military necessity or material conditions make such an operation impossible or, extremely dangerous. However, under no circumstances may a belligerent refuse quarter or kill survivors, "Survivors struggling in the water or seeking safety on life rafts or in life boats are no longer effective instruments of military power...(T)hey are not lawful objects of attack."[141] Furthermore,

> If a ..commander can without danger to his (ship) save or succor survivors, he is... under a duty to do so. If however, by doing so he would endanger his (ship) he cannot be held responsible if he does

> not save any...survivors since it is recognized that the safety of his own (ship and crew) must be his primary consideration. It is clearly recognized, on the other hand, that the killing of defenseless survivors of a torpedoed ship is a war crime.[142]

The duty to render assistance after an engagement is of particular importance and significance when merchant ships are involved. The Civilian's Convention specifically provides that as far as military necessity allows, "Each party to the conflict shall facilitate the steps taken to search for the...shipwrecked..."[143] It would also appear that the Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea would be applicable. It provides that, "Every master is bound, so far as he can do so without serious danger to his vessel, her crew, and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost."[144] It is also noted that in the event of an engagement between a man-of-war and a merchant vessel, the crew and passengers of a merchant ship are also protected by Part IV of the Treaty for the Limitation and Reduction of Naval Armament, (London Naval Treaty) which provides in part that:

> Except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship...may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are

> not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[145]

Closely related to the killing of survivors is the refusal to give quarter. It is unlawful for a combatant to continue an attack when there has been a clear indication of surrender. Once the enemy has indicated surrender quarter must be given and the objective seized without further firing. Some writers contend that it would be permissible to refuse quarter in the case of reprisal.[146] However, it is the writer's opinion that the helpless survivors of a vessel or military objective are not proper objects of reprisals especially in view of the prohibitions of the Geneva Conventions of reprisals against protected persons. Once a person surrenders he becomes a protected person to be respected and cared for.

3. Treatment of the Deceased: Examination and Proper Burial

The parties to a conflict are required after each engagement to search not only for the living, but also the deceased.[147] The deceased must be protected from pillage and examined to confirm death and to establish identity. If no identification tags or papers are on the body, resort must be made to other methods of identification, such as fingerprints, pictures, or dental examinations. This information must then be forwarded to the adverse party. Belligerents must prepare and forward to each other, through the National Prisoners Information Bureau, certificates of death and

authenticated lists of the dead, identity discs or cards found on the body, wills and other important documents belonging to the deceased.[148]

As far as circumstances permit burial at sea must be carried out individually. The intention of this provision was not to preclude the, "Committal of several bodies at the same time...but to ensure that each body is committed separately in a weighted...bag."[149] In the event enemy dead are transferred to land, article 17 of the Land Convention would then be applicable and would take precedence over the Sea Convention.[150]

4. Prisoners of War: Dependent State Must Be Notified of Detention

As has been previously discussed enemy persons picked up at sea will become prisoners of war. Belligerents are required to forward as soon as possible to the Dependent State, information regarding each person falling into their hands. Generally, a warship has good reason to limit the use of its communication facilities, and information pertaining to the sick, wounded, and shipwrecked will not be transmitted until the ship arrives at port. The practice is that the ship will land the individuals concerned at which time the Land and P.O.W. Conventions will take precedence over the Sea Convention.[151] However, in order to leave no gaps, provisions were also incorporated within the Sea Convention pertaining to notification of the Dependent State, even though, the Land and P.O.W. Conventions would be applicable.

The notification procedures are designed to work in the following manner. A commanding officer of a vessel which has aboard detained persons must obtain and forward certain information regarding each shipwrecked,

sick, wounded or dead person to a National Prisoners Information Bureau, which each belligerent is required to open at the commencement of hostilities. The information which the bureau receives from its armed forces is then forwarded to both the Protecting Power and Central Prisoners of War Agency.[152] It is generally the job of the Protecting Power to provide the Power of Origin of the persons concerned with the information received from the National Information Bureau.

The functions of the Central Prisoners of War Agency are set forth in the P.O.W. Convention.[153] As it is not within the scope of the present paper to consider in detail the nature and operation of that agency, it will be discussed only in general terms. One of the primary functions of the Central Prisoners of War Agency is to keep detained person's families informed and to form a permanent link between them and their captured relatives. The agency is essentially concerned with human relations, whereas the functions of the Protecting Power are mainly administrative. The agency conducts inquiries of itw own, arranges for exchanging of correspondence and the forwarding of personal property.[154]

The information concerning detained persons required to be forwarded by each belligerent as expeditiously as possible consists of the following: (1) designation of the power on which the detained person depends; (2) serial number; (3) full name; (4) date of birth; (5) any other provision shown on the detained persons identity card or disc; (6) date and place of capture or death; and (7) any particulars concerning wounds, illness, or cause of death.[155] It is interesting to note that all of the required information, under normal circumstances can be obtained without interrogation. Items 1 - 5 in the above list can be obtained simply by reading

the identity card or disc which all military personnel are required to carry with them. The information required by items 5 and 6 can be supplied by the crew of the vessel which rescued or picked up the detained persons. The reason for limiting the information which a Detaining Power is required to obtain is to protect prisoners from pressure which a Detaining Power might be tempted to resort to in order to obtain information of a military character.

It is noted that when interrogating enemy personnel the provisions of the P.O.W. Convention must be complied with as there is a gap in the Sea Convention relating to this matter. The Sea Convention discusses information which must be obtained from enemy personnel, but does not discuss the prohibitions connected with interrogations.[156] It is recognized that intelligence is of vital importance to belligerents, accordingly belligerents are not prohibited from interrogating prisoners regarding military matters and matters beyond the scope permitted by the Convention. The prisoner, however, is not bound to answer questions other than those which have been set forth previously. A prisoner may not be punished for giving false information in response to questions of a military nature.[157] However, interrogators are prohibited from applying mental or physical torture of any form for the purpose of securing military information.

The duty incombent upon belligerents to forward information applies not only to military personnel, but also to civilians. As it is the duty of belligerents to collect and assist not only military personnel, but also civilians who are the victims of a disaster at sea.[158]

Article 19 of the Sea Convention makes reference to "unidentified articles" which should be forwarded to the enemy. It has happened, in

war, that the only parts of a ship or plane, found after a brutal explosion were a few stray objects floating in the sea. By collecting and forwarding such objects the enemy may be able to identify the persons who have disappeared. Sometimes floating debris is the only proof of the total disappearance of an entire crew of a ship or airplane.[159]

5. Status of Civilians and Merchant Vessels Who Render Humanitarian Aid to the Enemy

Previously, it was discussed that belligerents have an obligation to search for and collect the wounded, sick, and shipwrecked after every engagement and if the belligerent is unable to collect and care for the casualties it can make an appeal for assistance. In addition, merchant vessels, private citizens and relief societies may on their own initiative render aid to the wounded, sick and shipwrecked, without a request to do so.

In order to encourage merchant vessels and private individuals to assist in the collecting and rendering aid to the victims of a naval engagement, the Sea Convention provides that:

> Vessels of any kind responding (to an appeal for assistance), and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection...to carry out such assistance. They may, in no case, be captured; but in the absence of any promise to the contrary, they shall remain liable...for any violations of neutrality they may have committed.[160]

The quoted privision is based on the fundamental humanitarian principle that not only must a wounded, sick or shipwrecked person be respected, but he must also be collected and cared for without delay. The purpose of the protection is to improve the lot of war victims. Tending the wounded, sick, and shipwrecked does not constitute an interference in a conflict, nor is it a violation of neutrality. A violation of neutrality is the giving of military assistance such as the transporting of war contraband or the running of a blockade.[161]

A belligerent must permit spontaneous care for war victims by local civilians where they are able to do so. However, a belligerent may prosecute its own citizens for concealing or putting an enemy national in the hands of an escape or resistance organization.[162] A belligerent should under no circumstances encourage civilians to harm or injure enemy personnel who are hors de combat as the civilian population has an obligation, same as military personnel, to respect the wounded, sick, and shipwrecked and to abstain from inflicting violence upon protected persons. Breach of this obligation by a civilian constitutes a war crime. During World War II there were many instances of civilians committing acts of violence against Allied personnel who were hors de combat. After the war several civilians were convicted of war crimes because of maltreatment of enemy personnel who were hors de combat.[163]

C. IMMUNITY OF HOSPITAL SHIPS

International law recognizes that certain belligerent vessels are exempt from capture or destruction when innocently employed. These include: cartel vessels - vessels designated for and engaged in the exchange of prisoners of war; hospital ships and medical transports when properly designated; vessels charged with religious, scientific, or philanthropic missions; small coastal fishing vessels; and vessels guaranteed safe conduct by agreement between belligerents.[164] Included within the classification of hospital ships entitled to immunity are: all military hospital ships, belligerent private enemy hospital ships, and private neutral hospital ships.

The Sea Convention contains several articles pertaining to hospital ships and small rescue craft. These provisions represent a most important part of the Convention and are designed to provide protection and respect for hospital ships as well as to prevent abuses of the privileges which such vessels enjoy, that is, to ensure that military commanders do notgive way to temptations to use empty shipping space for any unauthorized purpose.[165]

Military hospital ships are vessels especially equipped for the purpose of assisting, treating and transporting of the wounded, sick, and shipwrecked. Such vessels are generally commissioned vessels of a State's navy and are immune from attack and capture. However, hospital ships are not warships even though they may be part of a nation s navy. Accordingly, hospital ships are not subject to many of the restrictions applicable to warships; an illustration of this is that hospital ships are free from many of the restrictions which can be imposed upon belligerent warships

in neutral ports.[166] The framers of the Convention felt that in view of the humanitarian characteristics of a hospital ship it would have been unjust to submit such ships to the same restrictions as warships.[167] Another privilege enjoyed by hospital ships not extended to warships is that, "Any hospital ship in a port which falls into the hands of the enemy shall be authorized to leave the said port."[168] Thus a hospital ship is exempt from capture or seizure in a port just as in the territorial sea or on the high seas. However, it is noted that this freedom from capture whether in port, territorial sea or high seas does not prohibit inspection or even detention of up to 7 days if the gravity of the circumstances so requires.[169]

The second class of hospital ship (belligerent private enemy hospital ships) consists of those ships equipped wholly or in part at the expense of private parties or officially recognized relief societies of one of the belligerents. For the most part a private hospital ship is subject to the same conditions and entitled to the same respect and protection as a military hospital ship provided it has received an "official commission" from its government.[170] This Commission is merely an authorization putting the ship into service, (should not be confused with the commissioning of a war or naval ship), it can be in the form of a separate document or just a notation in the ship's log.[171]

The third class of hospital ships (private neutral hospital ships) are also equipped wholly or in part at the expense of private individuals or officially recognized relief societies. This type of hospital ship is entitled to the same privileges and immunities astthe other two classes of hospital ships if placed under the control of a party to the conflict

and has received permission from its own government. Eventthough a private neutral hospital ship consents to control by one of the belligerent's this in no way prevents the ship from rescuing and treating without regard to nationality or for that matter any other form of discrimination, those in need of assistance in accordance with the general humanitarian principles set forth in the Geneva Conventions.[172]

The Sea Convention specifically provides that, "Merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities."[173] The reasons for including this provision in the Convention was to prevent a vessel from being camouflaged as a hospital ship for purposes of escaping from a blockaded port or crossing a danger zone, and to afford to hospital ships a position of stability and permanence.[174] It was felt that much confusion could be avoided by prohibiting repeated conversions and it is doubtful whether hasty conversions would be intthe best interest of the wounded, sick, and shipwrecked. Furthermore, in time of war it would be completely undesirable to permit a belligerent to prevent imminent capture or destruction of a ship by hastily converting it to a hospital ship.[175]

There are two conditions for according immunity to hospital ships. They are: the belligerents undertake not to use hospital ships for any military purpose, the sole purpose of the ship will be for the assisting, treating, and transporting of wounded, sick and shipwrecked persons;[176] and the name and characteristics of a hospital ship must be notified to the parties prior to its being put into service.[177] If a hospital ship [illegible]ies these conditions it is entitled to protection and respect at all times and under all circumstances. The immunity accorded to hospital ships

also extends to life boats of such ships.

The protection accorded to hospital ships is not lost unless such a ship engages in hostile acts harmful to the enemy. However, before any action can be taken against a hospital ship suspected of engaging in illegal activity, a warning must be given providing a reasonable time limit for the ship to put an end to its unlawful acts after which the vessel may be captured or even attacked in rare cases. Needless, to say if it becomes necessary to capture or attack a hospital ship, a belligerent should do everything it possibly can to ensure the humane treatment of the wounded, sick, and shipwrecked aboard the vessel, as the protected parties could not be held responsible for the unlawful act of the crew.[178] The Convention does not set forth what constitutes a reasonable time limit. However, it is submitted that the time period will vary depending upon the gravity of the violation and other facts and circumstances. It is to be emphasized that, the immunity of a hospital ship is not jeopardized because the ship contains sophisticated apparatus which is used to facilitate navigation and communication; or the ship is transporting medical personnel and equipment over and above normal requirements; or the crew is armed to maintain order and for self defense; or there is the presence of portable arms and ammunition taken from the wounded, sick, and shipwrecked; or care has been extended to civilians.[179]

As the signatories to the Convention have agreed to employ hospital ships and rescue craft for only humanitarian purposes, belligerents in order to assure themselves that this is the case, must be able to take practical precautions (since a hospital ship can move about freely) to ensure that such a ship is not engaging in illegal activity. In order to

ensure that the immunity of hospital ships is not abused and that the military interests of the belligerents are protected, the Convention provides that belligerents can search hospital ships; decline assistance from them; require such ships to followsa prescribed course of navigation; limit the use of such a ship's means of communication; and can even even temporarily place aboard a commissioner to ensure compliance with the Convention and any special instructions given by a belligerent. Moreover, the belligerents may either unilaterally or by agreement place neutral observers on ships to ensure observance of the Convention.[180] The task of an observer is to, "Verify the strict observation of the provisions (of)...the Convention."[181] The reports made by an observer will make it possible to prove any breach which may have been committed or to clear the vessel of unfounded charges and thus prevent the possibility of the enemy resorting to reprisals.

It appears that the Convention has settled the disputed question, which arose during World War II, as to the size of hospital ships. There were no size limitations set forth in previous Conventions and the dispute arose when Germany commissioned a large number of small craft for the purpose of rescuing downed airmen. The British announced that they would refuse to recognize hospital ships of less than 3,000 tons. The reason for the British position was that they were reluctant to give recognition - and consequent immunity to large numbers of small craft which might be used by the enemy for espionage and intelligence work, in the vicinity of coastal defenses at a time of what was believed to be an imminent invasion. The United States did not adopt such a position nor did the British strictly enforce the 3,000 ton limitation.[182] The Sea Convention sets

forth no minimum standards as to size of hospital ships; it provides that it, "Shall apply to hospital ships of any tonnage and to their life boats ...(T)o ensure maximum comfort and security, the Parties (should) endeavour to utilize...hospital ships of over 2,000 tons gross."[183]

The Convention also extends immunity to small rescue craft, which in the true sense, are not hospital ships but are used in rescue operations. The protection accorded is not absolute. The Convention uses the language, "So far as operational requirements permit."[184] This language was used so as to take into account the risks incurred by such craft, because of their size, in a zone of military operations and to the situation during World War II when Germany wanted to use a number of such craft for rescue work in the English Channel.[185] (British position was that such craft would interfer with military security). Small rescue craft, in order to be protected, must comply with the same requirements as to notification, use, and markings as a hospital ship.

It would seem that the proper test as to whether a particular ship or rescue craft comes under the protection of the Convention should be whether the vessel is genuinely equipped for the rescue or transport and care of the wounded, sick, and shipwrecked; and hether the vessel is engaging in acts of hostility. In other words, a purpose test should be applied and each case, as to whether or not a particular vessel was in compliance with the Convention, would depend upon a factual situation. Belligerents have the right to inspect and search vessels protected by the Convention; also, if a hospital ship or rescue craft is engaging in espionage or intelligence work, or for that matter, any unalwful activity, it looses its immunity. There is no need for a vessel which is legitimately

engaged in the search, rescue, or treatment of the wounded, sick, and shipwrecked to be devious or secretive.

The Sea Convention has carried over a provision from the Tenth Convention which provides that should fighting occur on board a warship the sick bays shall be respected and spared as far as possible.[186] The framers of the Convention acknowledged that the provision was somewhat obsolete. However, since the provision was in no way objectionable and was in accordance with the general principles of the Geneva Conventions, requiring respect and protection for hospital facilities, it was included in the present convention.[187] This provision pertains to fighting which might occur aboard a warship. It does not extend immunity to a warship just because it may have limited hospital facilities. As in the case of medical establishments ashore, sick bays, and their equipment remain subject to the laws of warfare. Warships along with their contents may be destroyed or captured. However, sick bays and their equipment, if captured, "May not be diverted from their purpose so long as they are required for the wounded and sick."[188] However, the belligerent into whose hands sick bays and medical equipment may have fallen, can after ensuring the proper care of the wounded and sick apply the equipment and facilities to other purposes.

1. Medical Transports

A medical transport is any vessel used for the transporting of medical equipment and supplies exclusively intended for humanitarian purposes.[189] Such a vessel is entitled to safe passage at sea, provided the

particulars of the voyage have been notified to, and been approved by the adverse party.[190] The adverse party is not called upon to approve the shipment - for that is authorized by the Convention. Only the "particulars regarding the voyage" may be contested, namely, route to be traveled, date, speed of vessel, and markings. It is not necessary that a medical transport be permanently assigned to the transport of medical equipment and supplies; a vessel can be chartered for a single voyage.[191] (This is in contrast to a hospital ship which cannot be chartered for a particular voyage).

The conveyance of not only medical equipment, but also pharmaceutical supplies intended for the prevention of disease is authorized by the Convention to be carried by a medical transport. This is a new provision which did not appear in earlier Conventions. Prior to the Sea Convention it had been the practice of belligerents to make humanitarian concessions which would have benefited only those victims who were in a weakened condition and thus, for all practical purposes, incapable of doing harm. This is no longer the case and it seems that the Convention provides that the fight against suffering must have priority and that prevention is better than cure.[192] A medical transport may not be captured nor the equipment and supplies siezed. However, it may be boarded and inspected and by agreement between the belligerents, neutral observers may be put on aboard to verify the equipment and supplies carried.

2. Personnel and Crew Members Aboard Hospital Ships

The Sea Convention provides that the religious, medical, and hospital personnel of hospital ships and their crews must be respected and protected. Such personnel may not be captured while in the service of a hospital ship even if there are no wounded, sick, or shipwrecked on board.[193] The Convention establishes a rule of absolute exemption from capture of religious, medical and hospital personnel of hospital ships, as well as their crews. This is not the case for similar personnel on land or for such personnel on other ships.[194] The logical reason for this rule is the absolute prohibition contained in the Convention against capture of hospital ships. The operation of hospital ships could be rendered inoperative if their crews and other personnel could be taken prisoner, since without such personnel the hospital ship would be unable to function and would be merely a derelict.

If religious, medical, or hospital personnel, while in the service of a hospital ship, should come into the hands of an enemy belligerent, they must be respected and protected under all circumstances. They may not be deemed prisoners of war and must be sent back to their side as soon as the authorities of the Detaining Power consider it practical.[195] It is to be expected that a belligerent will not allow such personnel to return at a time when they could convey useful military information to their own side, but they should be allowed to return as soon as circumstances permit.

The distinction between religious, medical, and hospital personnel aboard a hospital ship and warship is important as such personnel not in the service of a hospital ship may be retained to take care of the medical

and spiritual needs of prisoners of war. Retained personnel may be kept as long as it is necessary for the care of the wounded and sick. Upon landing, retained personnel become subject to relevant provisions of the Land Convention. Retained personnel are not prisoners of war, but must benefit by all provisions of the Land and P.O.W. Conventions. Retained personnel are subject to the internal discipline of the prisoner of war camp in which they are working; however, they may not be required to perform any work outside their medical and religious duties.

Even though the Convention does permit retention under certain circumstances of medical and religious personnel, this does not relieve the Detaining Power of the obligations imposed upon it with regard to the medical and spiritual needs of prisoners of war. A Detaining Power cannot transfer its responsibility for the welfare of prisoners of war to retained personnel.

As has been previously discussed, a warship is entitled to inspect and search a hospital ship. The warship may require the handing over ofaany wounded, sick, or shipwrecked personnel found on board. If on board there are men of the same nationality as the warship, it can release them from captivity. If there are enemy wounded, sick, and shipwrecked the warship can demand their surrender, provided that they are in a "Fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment."[196] Generally, the right to surrender is not exercised by a warship, as it is to the advantage of the warship to leave enemy wounded on board the hospital ship rather than incur responsibility for their care. However, on several occasions during World War II, the Allies diverted enemy hospital ships to Allied ports

where the enemy sick and wounded were put ashore and the ships released.[197] There has been some discussion by writers as to whether or not the right of surrender is keeping with the humanitarian principles of the Convention. It is submitted that a belligerent would be reluctant to allow enemy personnel, often comprising technical grades, and only slightly wounded and capable of returning to the fighting within a few months to pass through its hands. However, if a hospital ship is diverted to a port it would appear that the objections as to adequate facilities would not necessarily be valid.[198]

If medical and religious personnel are to be respected and protected, a belligerent must be able to recognize them. An attempt has been made in the Convention to provide a way of identifying such personnel. The Convention provides that such personnel shall wear affixed to their left arm a water-resistant armlet bearing the distinctive emblem, issued and stamped by the proper military authorities. The latter is particularly essential in order to ensure that the armlet is worn only by those who are entitled to do so under the Convention. This condition is an essential one, admitting of no exception. In addition to the armlet the Convention provides that all personnel exclusively engaged in protected activities must carry a water resistant identity card. This identity card is to state in what capacity the bearer is entitled to protection.[199]

Confiscation of the identity card and armlet by the adverse party is prohibited. In World Wars I and II personnel engaged in protected activities sometimes had their armlets and cards taken fromtthem. This was a convenient way for the capturing State to evade its obligations toward such personnel. Such practices are strictly forbidden and the

special insignia and identity cards of personnel engaged in protected activities may be withdrawn only by the military authorities who issued the armlet and card.[200]

3. Markings of Hospital Ships

The experience of World War II showed that many of the attacks on hospital ships were attributable to insufficient markings. Therefore, in order to make possible, identification of hospital ships at a distance or from a high altitude, the drafters incorporated within the Sea Convention fairly detailed provisions pertaining to the exterior appearances of such ships.

Apart from the national flags, the Convention provides that all hospital ships should have the same markings. All exterior surfaces of hospital ships are to be painted white with one or more red crosses painted and displayed on both sides of the hull and on horizontal surfaces. A white flag with a red cross is to be hoisted as high as possible. At night and at times of reduced visibility, hospital craft must, subject to the assent of the power to the conflict under whose control they are, take the necessary measures to render their painting and distinctive emblem sufficiently apparent.[201]

It is unfortunate that the Convention did not set forth mandatory requirements pertaining to illumination of hospital ships at night. However, it was correctly felt that there may be occasions when the tactical situation prevents illumination of hospital ships at night. Examples of such tactical situations are: (1) a brightly illuminated ship in port

could unintentionally guide enemy bombers to their targets; (2) an illuminated hospital ship passing through defensive minefields might betray the swept channels; or (3) illuminated hospital ships following up a night landing operation could eliminate any elements of surprise. It seems that the practice regarding an illumination of hospital ships is that absence of illumination does not deprive such a ship of immunity. It must accept the risk of accidental attack and accordingly it cannot complain if it is mistaken for a legitimate target. In other words, the lack of illumination of a hospital ship is similar to the situation where a hospital ship is close to a legitimate target, the ship does not forfeit its immunity, but must accept the risk of unintentional, and non-deliberate damage.[202]

It would seem that the best practice would be that hospital ships should be brightly illuminated at night except when the tactical situation required otherwise, then the decision could be made by the local military commander. Furthermore, as hospital ships may not interfere withthe military operations of belligerents they may be ordered out of an area or be prevented from entering an area under attack, for the reason that the presence of the ship would interfer with attacking forces.[203]

Use of the protective emblem is forbidden by all vessels and persons not authorized by the Convention. The emblem cannot be utilized, except as provided for in the Convention, for any objective, however commendable, or for any other humanitarian purpose. This prohibition against wrongful use is valid at all times, in peacetime as in war.[204]

The parties to the Convention have agreed to take the measures necessary for the prevention of abuses of the emblem and to enact legislation

where necessary. However the Convention did not prescribe a time limit for nations to enact protective legislation and needless to say the current legislation pertaining to the abuses and the wrongful use of the red cross emblem in most countries is inadequate. It is noted that legislation no matter how adequate is not sufficient in itself. Once legislation is enacted, a close watch must be kept and wrong doers prosecuted. For it is only at the cost of unremitting effort that the proper authorities can succeed in defending the red cross emblem and preserve its protective value and in so doing it must never be forgotten that human lives may be at stake.[206]

IV. APPRAISAL AND RECOMMENDATIONS

The Geneva Conventions were not in force as to any of the participants when the Korean conflict began. However, General MacArthur, the United Nations Commander in Korea, announced early in the conflict that all United Nations forces would abide by the Geneva Conventions of 1949.[207] In addition, during the course of hostilities, a number of the governments contributing troops to the United Nations Command in Korea did ratify the Conventions.

Early in the conflict the North Korean Government in a reply to a communication from the Secretary General of the United Nations stated it was, "Strictly abiding by (the) principles of (the) Geneva Convention in respect to prisoners of war."[208] While there is no record that the Chinese Communist regime or the commander of its "volunteers," in Korea, explicitly undertook to abide by the Conventions, the Foreign Minister of Communist China did on July 16, 1952 inform the Swiss Government that the Chinese Government had decided to adhere to the Geneva Conventions of 1949.[209]

Throughout the course of the Korean hostilities, both sides repeatedly claimed to be scrupulously carrying out the provisions of the P.O.W. Convention. At no time did either side challenge the applicability of the Convention or take any position on the basis that the Convention was not legally applicable. Throughout the fighting and the long months of negotiating the armistice, both sides publicly assumed that the P.O.W. Convention was applicable, each side claimed that it was living up to the Convention and accused the other side of violating it.

As to the States involved in the conflict the position regarding the other three Geneva Conventions was for the most part, identical to that of the P.O.W. Convention with the exception of the North Korean authorities who limited their undertakings to the P.O.W. Convention. However, it is emphasized that during the Korean conflict there was little or no naval action as envisaged by the Maritime Convention. Accordingly, the primary concern was the treatment accorded to sick and wounded on land and prisoners of war.

Although both sides in the Korean conflict stated they would apply the P.O.W. Convention, there was a stark difference in the treatment which the two sides in fact accorded their prisoners of war. The United Nations Command in compliance with the Sea Convention and similar provisions of the other Geneva Conventions sent lists of captured personnel to the International Committee of the Red Cross (ICRC) which in turn transmitted them to the Communists. The United Nations Command welcomed representatives of the ICRC into P.O.W. camps from the very beginning of hostilities and accorded such representatives every facility to carry out their functions under the Geneva Convention. On the other hand, the Communists while claiming to abide by the P.O.W. Convention, failed to live up to it in virtually every important respect. Except for a token list of 110 names transmitted to the ICRC in the early days of the war, the Communists did not release the names of captured personnel.[210] While neither side appointed a Protecting Power, the Communists failed to designate an impartial humanitarian organization to oversee the treatment of captured personnel. In fact, the Communists rejected the persistent efforts of the ICRC to obtain entry into Communists P.O.W. camps for

purpose of inspection. In addition the Communists refused to permit prisoners to send or receive mail, to report on the health of prisoners, to give accurate location of prisoner of war camps, to properly mark prisoner of war camps, and to locate prisoner of war camps away from legitimate military targets. However, the most serious violations committed was the killing, beating, starvation, and general mistreatment of persons hors de combat by the Communists. It is interesting to note that during the Korean War a total of 7,190 Americans were captured,[211] of this total approximately 2,730 died in prison camps. This ghastly death toll - 38% - was the worst since the Revolutionary War.[212]

The conduct of the Communists during the Korean hostilities, regarding war victims left much to be desired. The attitude of the Communists to the Geneva Conventions was entirely cynical. They would pick and choose the provisions of the Conventions they deemed applicable, and then apply a literal method of interpretation.[213]

In regard to the Vietnam conflict the ICRC as early as the spring of 1965 took the position that, "The hostilities raging at the present time in Vietnam both North and South of the 17th parallel have assumed such proportions recently that there can be no doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied."[214] There is no question of doubt that the ICRC was referring to the applicability of the four Geneva Conventions. However, as it was in Korea, the Land and P.O.W. Conventions are of primary concern in the Vietnam conflict. The reason for this can be attributed to the manner in which the war is being waged.

All the parties (except of course the Viet Cong) are parties to the four Geneva Conventions. It has been the policy of the United States and the South Vietnamese to scrupulously abide by the provisions of the Conventions despite the difficulties presented by an insurgency situation. In general, the rights of prisoners of war are accorded to all persons captured under arms, even though it may be doubtful as to whether certain categories of captives fall within the classification of persons which may be considered as combatants.

The North Vietnamese have taken a very different attitude toward captured persons than have its adversaries. The Hanoi government contends that it has no troops in South Vietnam and that the United States is engaging in a war of aggression. It is also a position of the North Vietnamese that captive American airmen are war criminals and not entitled to the protection of the P.O.W. Convention. Even though the North Vietnamese profess that the prisoners in its hands are treated humanely, representatives of the ICRC never have been able to inspect the North Vietnamese prison camps. The Communists in Vietnam, just as the Communists in Korea before them view war victims as tools of psychological and political warfare. The prisoners they hold are mistreated, well treated, or released depending upon the political purpose to be served.

It appears that the lesson to be learned from both the Korean and Vietnam conflicts is that the Communists place little value on human life. The Communists are not interested in protecting persons hors de combat for reasons of humanity. Their interest in war victims is that such individuals can be used as a psychological or political weapon in forcing an adversary, that is conscious of humanitarian values, to make

concessions not obtained on the field of battle or through legitimate negotiation. Accordingly, to the Communists persons hors de combat are in a sense a commodity which can be used as a negotiating lever.

It is unfortunate that the parties have been reluctant to honor and abide by the humanitarian principles and purposes set forth in the Geneva Conventions. In the future there must be a greater emphasis placed on human rights, humanity, and character by not only States, but also national and international philanthropic organizations, and private individuals. As has previously been discussed the four Geneva Conventions grew out of the harsh experiences encountered by millions of people during World War II. Since World War II new developments in the waging of war have taken place, much emphasis is placed on political and psychological warfare and persons hors de combat have repeatedly been made the subject matter of this type of warfare. It is true that history can be a guide in preparing for the future, however, when drafting international agreements such as the Geneva Conventions of 1949, it is impossible to provide for all unforseen contingencies. It was the intention and hope of the ICRC and the great majority of delegates to the Geneva Conference of 1949 that the humanitarian purposes and principles set forth in the Conventions would influence and prevail in all combat situations and in negotiations pertaining to hostilities, such has not always been the case particularly in regard to the Korean and Vietnam conflicts. Nevertheless, the Sea Convention constitutes a remarkable step forward in the field of human endeavour and in the development of the law of naval warfare. It constitutes a real advance in that field of international law which is concerned with human rights and the minimizing of the effects of war and is

in accordance with that recognition of fundamental human rights found in the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on December 10, 1948. The preamble of that Declaration states that, "Recognition oftthe inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace." It also warns that, "Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind."[215]

It is unfortunate that for our day and age the Sea Convention, as well as the other three Geneva Conventions of 1949, represent the high watermark of humanitarian achievement in the evolution of the law of war. Hoepfully, the time will come when the nations of the world will be able to settle their differences through cooperation, understanding, and negotiations at the conference table. Until such time, international agreements such as the Sea Convention will continue to be of utmost importance in attempting to minimize the effects and evils of war. However, in order for the Convention to fulfill its purpose, decision makers in interpreting and applying the Convention must remember that, "No set of words can, apart from context, have any one 'clear', 'unambiguous', or 'literal' meaning that of itself compulsorily determines decision whatever the particular circumstances, may be."[216] It is unfortunate that none of the Geneva Conventions establish or recognize any organization which can provide a binding interpretation of terms of the treaties. Only the member States a a group can determine the meaning of the Conventions. As a practical matter, of course, the large number of signatories make it difficult for the parties to reach authoritative decisions in this manner.

As the drafting of the Geneva Conventions was a response to inadequacies of earlier treaties and the customary law as brought to light by experiences in World War II it seemed doubtful, taking into consideration the current state of affairs, that member States would expand the effort to convene and consider questions of interpretation without a showing that the Conventions in some way were unsatisfactory.[217] Thus, if the Conventions are to survive and be effective they must be treated as having a potential for growth similar to that which has characterized the customary rules of warfare. The object of interpreting the Conventions must be to determine how their purposes may be best achieved in the light of changing conditions. The specific purposes of the Geneva Conventions require that ambiguities be resolved in favor of the widest possible coverage. The goals of mitigating the excesses of war and providing humane treatment for war victims requires a broad and flexible construction of the Conventions.[218] Accordingly, a rational theory of interpretation must be employed. "A rational theory of interpretation... (recognizes) that treaty words acquire meaning in specific controversies only from context and in terms of the major purposes and demands of the parties..."[219] There is no doubt that the major purpose and demands of the Conventions are humanitarian in character - for the benefit of those who become victims of war to prevent abuse by inhumane treatment - and it is submitted that anyone of good faith is capable of applying the provisions of the Conventions correctly, rovided he is acquainted with the basic principles. Many problems in interpretation can be avoided by an endeavor to fulfill the purpose of the Conventions rather than the literal application of individual sections of a Convention. It must be remembered

that the Conventions were drafted to protect individuals and not to serve State interests. A remark of the International Court of Justice with regard to the Genocide Convention of 1948 applies with equal force here:

> In such a convention the contracting States do not have any interests of their own: they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[220]

The Sea Convention starts from the hypothesis that law is a primary element of civilization. Even though war is a fact of the contemporary world, it must be limited by law. Its aim is to safeguard respect for the human person, the fundamental rights of man and his dignity as a human being, in the hope that universal peace may one day be established. Until such time, and as long as there is war the Sea Convention, as well as the other three Geneva Conventions, prescribe a minimum standard of treatment which must be accorded to war victims. However, regardless of the grandoise provisions and rules set forth in the Conventions and the great number of

countries which claim to adhere to the Geneva Conventions, they are useless unless the people of the world are made aware of the basic provisions set forth in these Conventions. Humanitarian law affects nearly everyone, and in a modern war, where the fighting takes place everywhere (as in Vietnam) anyone may be faced with a situation in which he has to either apply or invoke one of the Conventions. Accordingly, States have a duty to publicize and distribute the Conventions as widely as possible. This can be done by encouraging courses of instruction to both the military and civilian population in the humanitarian law of the Geneva Conventions. Currently, many governments provide some instruction to their military forces, but for the most part seem to neglect their civilian populations. Institutions of learning and local Chapters of the Red Cross should be encouraged to offer courses and programs of study which could include the humanitarian law of the Conventions.

The complexities are many when it comes to international agreements regulating warfare. Policy makers are faced not only with the task of developing, and drafting international humanitarian agreements, but also with enforcing compliance with them during periods of turmoil. Widespread dissemination of the Conventions would facilitate the task of policy makers; it would also spread the principles of humanity and would help to develop a spirit of peace among the peoples of the world.

Prior to the Geneva Conventions neither the customary law nor the conventional law, relating to the law of war, required States to exercise a universal penal jurisdiction over those who violated the law of war.[221] The Geneva Conventions do not provide for compulsory universal penal jurisdiction in respect to all violations of the Conventions; only those

offenses enumerated as "grave breaches;" but, does make it mandatory for contracting parties to legislate so that effective penal sanctions may be imposed on all perpetrators of "grave breaches" regardless of nationality. The significance of this measure in the development of the law of war is that national courts will impose sanctions for the violations of the laws of war not only on their nationals, but individuals of any nationality within their territorial jurisdiction.

It is submitted that the procedure set forth in the Conventions for the trial of persons accused of committing a "grave breach" is satisfactory, especially as it relates to a State's own nationals. However, some of the same criticisms which were leveled against many of the war crimes trials following World War II could also be made against the system provided for in the Conventions when a victor is trying nationals of a defeated power for alleged war crimes. If past experience is precedent, war crimes trials of nationals of a defeated State by a victor State will take place at the conclusion of hostilities and only when there has been a decisive victory. Thus, there would be the criticism that the victor's court is dispensing justice and making the determination as to whether or not a "grave breach" had been committed. It is suggested that this criticism could be avoided by having the courts of a neutral State take jurisdiction of any such cases or in the alternative; if for any reason a neutral State did not take jurisdiction; the victor State could retain jurisdiction, but use jurists from a neutral State. This procedure could be followed, without being in violation of the Conventions, and in the writer's opinion it would certainly be in keeping with the humanitarian purposes of the Conventions.

It is unfortunate that in drafting treaties pertaining to the law of war the drafters write rules based upon factual situations of a past war. This is most ably illustrated in article 3 of each of the Conventions which speak in terms of a "conflict of an international character" and "conflict not of an international character." It would have been better if the Conventions spoke in terms of only a single armed conflict. Thus, some of the problems of whether or not the Conventions would be applicable in particular situations, such as Vietnam, could be avoided.

The writer realizes that historically States have jealously guarded their sovereignty and resented interference in their domestic affairs. However, in the past 30 years the international law of human rights has developed to the point that gross violations of human rights are violations of international law and no longer come within the exclusive domestic jurisdiction of States. This is of great importance regarding the law of war and the application of the Geneva Conventions. In this day and age civil wars are so easily turned into international wars. This is particularly true in the present state of tension and conflict which currently exists in many parts of the world community. Article 3, like the rest of the articles of the Conventions, is concerned with individuals and the physical and moral treatment which they as human beings are entitled. It does not affect the legal or political treatment which rebels may receive if the rebellion should fail. Accordingly, it is recommended that the Conventions should be applied when the following criteria are met: that the party in revolt against the dejure government possesses an organized military force; an authority responsible for its acts, has the means of respecting and ensuring respect for the Convention and that the

government is obliged to have recourse to its regular military forces. If world order and protection of fundamental human rights is to have any meaning it must be realized that suffering and humiliation of human beings must not be tolerated and that humanitarian conventions such as the Genova Conventions must be applicable to all armed conflicts.

FOOTNOTES

1. Hague Convention IV Respecting the Laws and Customs of War on Land (1907) 36 Stat. 2277 (1910), T.S. 539, Art. 22. Even though Art. 22 is directed to the conduct of land warfare it is a principle of customary international law and applicable to the conduct of naval warfare. For a further discussion see U.S. Dept. of Navy, Pub. No. 10-2, Law of Naval Warfare § 600 n. 2 (1955).

2. 6 U.S.T. and 0 I.A. 3217 (1956). T.I.A.S. 3363.

3. Mallison, U.S. Naval War College, International Law Studies for 1966, 137 (1968).

4. U.S. Dept. of Navy, Pub. No. 10-2, Law of Naval Warfare § 220 (1955).

5. Trial of Alfred Felix Krupp Von Bohlen and Halbach, 10 Law Reports of Trials of War Criminals 139 (1949).

6. Mallison, Supra note 3 at 19.

7. Law of Naval Warfare § 220 and 640. It is interesting to note that the Aztec Indians of Central America practiced what we would call chivalry when engaged in war with other Indian Nations. For an interesting account of Aztec international law see, Seus, Aztec Law, 55 A.B.A.J. 736 (Aug. 1969).

8. Law of Naval Warfare § 640. "Legally permissible ruses include, but are not limited to, the following: surprises; feigned attacks; ambushes, retreats, or flights; simulation of quiet and inactivity; use of small units to simulate large units, transmittal of false or misleading messages or deception of the enemy's signals; deliberate planting of false information; and use of dummy ships, aircraft, airfields and other installations." Id § 640 n. 41.

9. See: Smith, Law and Custom of the Sea 91 (2nd ed. 1950); for a discussion of the use of a false flag by the German cruiser EMDEN. In 1914 used a false flag to approach a Russian Cruiser lying at anchor. After getting within range the EMDEN hoisted the proper ensign and then torpedoed the Russian cruiser. See: Halliday, An Agreeable Voyage, 21 American Heritage 8 (June 1970). For a discussion of the use of a false flag by Captain John Paul Jones, USN. Captain Jones in order to escape detection, while sailing in and near English water, prior to his famous raid on the English coast, disguised his ship, the USS RANGER, as a merchant ship and flew a Dutch pennant and a British jack from her masthead.

10. Law of Naval Warfare § 640 N. 42.

11. Art.'s 44 and 45 of Sea Convention. Art. 41 sets forth other emblems used by some countries instead of the red cross.

12. Art.'s 30, 34, and 35.

13. 10 Whiteman, Digest of International Law 399 (1968).

14. McDougal and Feliciano, Law and Minimum World Public Order 522 (1961).

15. Genesis 14: 14-17.

16. I Samuel 15: 2-3.

17. I Samuel 15: 8-35.

18. Report by the Secretary of Defense Advisory Committee on Prisoners of War, POW The Fight Continues After The Battle, 3 (Aug. 1955). (Hereafter cited as the secretary of Defense Rpt).

19. Id.

20. Greenspan, Modern Law of Land Warfare 4 (1959).

21. Pictet, Laws of War, International Review of the Red Cross 5 (1966).

22. Id.

23. Id. 4-5. The Arab leader Saladin, after the battle for the recapture of Jerusalem, permitted the Order of Malta to administer to the sick and wounded Christians abandoned on the battle field.

24. Id. 5.

25. Secretary of Defense Rpt., Supra note 18 at 49.

26. Greenspan, Supra note 20 at 397. that the term "cartel" can also refer to non-military agreements between beiligerents. An example of a non-military agreement would be an agreement permitting communication by mail by nationals of belligerents or trading in certain commodities. Generally, the term cartel refers to military agreements set forth in the text.

27. Pictet, Supra note 21 at 5.

28. Halliday, An Agreeable Voyage, XXI American Heritage 8 (June 1970) reports that John Paul Jones wrote that "This circumstance (treatment of captured American seamen) more than any other rendered me the avowed enemy of Great Britain." During the Revolutionary War Captive American

seamen were lodged in the worst of England's prisons, the "Old Mill" at Plymouth. However, the American Navy did not always treat its prisoners with kindness either. The claim was made and in some instances substantiated that Continental Navy Captains slew prisoners. Secretary of Defense Report. Supra note 18 at 49-51.

29. Treaty of Amity and Commerce with Prussia 8 Stat 84, 2 Mallog 1477 (1785). Art. 24 of this treaty provided that should friendly relations between the two States be disturbed by war that prisoners taken by either party would be humanely treated. A similar provision was contained in the following early treaties: Treaty of Peace and Amity with Tripoli 8 Stat. 214, 2 Malloy 1738 (1805) and Treaty of Guadalupe-Hidalgo with Mexico 9 stat. 922, 1 Malloy 1107 (1848).

30. Decree of May 4, 1792 of the French National Assembly, 1 DeClereg, Recveil des Traites de la France 217 (1864). Also reported in part in Levie, Penal Sanctions for Maltreatment of Prisoners of War, 56 Am. J. Int'l L. 435 (1962).

31. Levie, Penal Sanctions for Maltreatment of Prisoners of War, 56 Am. J. Int'l L. 435 (1962). Levie also reports at 435 N.9 that "It is, indeed, a paracox that one of the worst crimes of modern history, prior to World War II, was the killing at Jaffa, in 1799 by Napoleon Bonaparte, then a General serving under the French Directory, of more than 3,500 prisoners of war for whom he was unable to spare a guard from his already understrength army."

32. Draper, Red Cross Conventions 2 (1958).

33. 22 Stat 940, 2 Malloy 1903 (1882); see, Instruction for the Government of Armies of the United States in the Field, Gen. Orders No. 100 (April 24, 1863) Professor Francis Lieber was the principal author of this work which represents one of the first major efforts setting forth basic rules pertaining to the law of war. Also, Henry Dunant's famous pamphlet "A Memory of Solferino" first published in 1861 did much to awaken the humanitarian conscience of mankind. In fact this pamphlet was responsible for the establishment of a committee (This committee later became the International Red Cross) which convened an international conference to study medical services in the field. As a result of the work of this committee the Swiss Government in 1864 hosted an international conference which drafted the Convention of 1864.

34. Naval Battle of Lissa took place off the Dalmation coast near the island of Lissa on July 20, 1866. The battle lasted nearly four hours, several ships were sunk and hundreds of sailors drowned as a result of inadequate rescue methods. The Battle of Mobile Bay which took place on Aug. 5, 1864, was the most severe naval engagement of the Civil War, resulting in a large number of casualties.

35. Pictet, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 3 (International Committee of the Red Cross 1960).

36. 22 Stat. 940, 2 Malloy 1907 (1882).

37. Pictet, Supra note 35 at 6-10. Five articles of the "Additional Articles of 1863" related to war on land and thus had the effect of amending the Convention of 1864. However, in order to amend the Convention of 1864 it was necessary to obtain the agreement of all parties to that treaty. Had the articles concerning Naval Warfare been dissociated from the articles relating to land warfare there might have been a valid treaty.

38. Dept. of State Circular letter of May 13, 1898, 2 Malloy 1912 U.S. Policy of applying the "Additional Articles" during the Spanish American War is set forth in this document.

39. 32 Stat. 1827, 2 Malloy 2033 (1901) (Hereafter cited as Third Convention).

40. Compare Art. II of Third Convention with Art. IX of "Additional Articles."

41. 32 Stat. 2371, 2 Malloy 2326 (1910) (Hereafter cited as Tenth Convention).

42. Art. 21 of Tenth Convention.

43. Mallison, U.S. Naval War College, International Law Studies for 1966, 31-3 (1968).

44. Mossop, Hospital Ships in the Second World War, 24 Brit. Y.B. Int'l L. 399 (1947).

45. Robertson, Submarine Warfare, Jag Jr 3 (Nov. 1956).

46. Colombos, International Law of the Sea, 786 and 791 (6th ed. 1967).

47. Robertson, Supra note 45 at 4.

48. Pictet, Supra note 35 at 11.

49. Id.; Robertson Supra note 45 at 5.

50. Mossop, Supra note 44 at 400.

51. Id.

52. Compare Art. 5 of Tenth Convention with Art. 43 of Sea Convention.

53. See, Mallison, Supra note 43 at 192-5.

54. Far East International Military Tribunal Judgement 1072-75.

55. Trial of Eck. 1 War Crimes Trials 3; 1 Reps. U.N. Comm 2.

56. Art. 16 of Tenth Convention.

57. 47 Stat. 2074, T.S. 847. (1932).

58. Guettridge, Geneva Convention of 1949, 26 Brit. Y.B. Int'l L. 295 (1949).

59. Id. 295-96.

60. As of January 1, 1970 the following countries were parties to the four Geneva Conventions: Afghanistan Albania. Algeria. Argentina, Australia Austria, Barbados, Belgium, Botswana, Brazil, Bulgaria, Burundi, Byelorussian S.S.R., Cambodia, Cameroon Canada, Centra Africa Rep., Ceylon, Chile, Communist China, Colombia, Congo (Brazzaville), Congo (Kinshasa), Costa Rica, Cuba. Cyprus, Czechoslovakia, Dahomey, Denmark, Dominical Republic, Ecuador, El Salvador, Ethopia, Finland, France, Gabon, Gambia, Germany, Germany Dem. Rep., Ghana, Greece, Guatemala, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Korea, Korea Dem. Rep., Kuwait, Laos, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco Mongolian People's Rep., Morocco, Nepal, Netherlands, New Zeland, Nicaragua. Niger, Nigeria, Norway. Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Rwands, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapre, Somali Rep., S. Africa, Southern Yemen, Spain, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Rep., Tanzania, Thailand, Togo, Trindad,and Tobago, Tunisia, Turkey, Uganda, Ukrainian S.S.R., U.S.S.R., United Arab Republic, United Kingdom, United States, Upper Volta, Uruguay, Venezuela, Viet-Nam, Viet-Nam Dem. Rep., Yugoslavia, Zambia.

Boliva, Burma, Estonia, Latvia, Lithuania, Nationalist China, are not parties to any of the Geneva Conventions of 1949. However, they are Parties to the Convention for the Amelioration of the Condition of The Wounded and Sick of Armies in the Field of 1929, 47 Stat. 2074, T.S. 847 (Hereafter cited as Land Convention of 1929); and the Treatment of Prisoners of War of 1929, 47 Stat. 2021, T.S. 846.

61. Land Convention, 6 U.S.T. 3114, 75 U.N.T.S. 31 (1956); Sea Convention 6 U.S.T. 3217, 75 U.N.T.S. 85; (1956) P.O.W. Convention 6 U.S.T. 3316, 75 U.N.T.S. 135 (1956); Civilian Convention 6 U.S.T. 3516, 75 U.N.T.S. 267 (1956).

62. Land, Sea and P.O.W. Conventions replaced as to signatories Land Convention of 1929, Tenth Convention, and Prisoner of War Convention of 1929.

63. Art. 12 of Land and Sea Conventions; Art. 16 of P.O.W. Convention and Art. 13 of Civilian Convention.

64. Gutteridge, Supra note 58 at 296-7.

65. Course of Five essons on The Geneva Conventions, Comite International DELA Croix-Route 26 (1962).

66. Greenspan, Modern Law of Land Warfare 68 (1959).

67. Five Lessons, Supra note 65 at 27.

68. Art. 2 of each of The 1949 Geneva Conventions.

69. Greenspan, Supra note 66 at 8.

70. 1 Oppenheim's International Law 671 (7th ed., Lauterpacht 1952).

71. Draper, Rules Governing the Conduct of Hostilities, the Laws of War and Their Enforcement, 18 Naval War College Rev. 34 (Nov. 1965).

72. Gutteridge, Supra note 58 at 300.

73. Id. 301.

74. Draper, Supra note 71 at 35.

75. Yingling and Ginnane, Geneva Conventions of 1949, 46 Am. J. Int'l L. 396 (1952).

76. 10 Whiteman, Digest of International Law 40-1 (1968). It is emphasized, however, that the determination, by a State, that a conflict falls within Art. 3 is generally based on political considerations rather than an objective assessment of the facts. For a discussion as to the reason why England and France did not apply Art. 3 when several thousand troops were used to quell conflicts in Algeria, Malaya, Kenya, and Cyprus see Draper, Red Cross Conventions 15 and N. 47 (1958).

77. Commentaries, Supra note 35 at 39.

78. Art. 7 of Land, Sea, P.O.W. Conventions; Art. 8 of Civilian Convention.

79. Commentaries, Supra note 35 at 54-7. The prohibition against renunciation of rights by protected persons is closely associated with the article on special agreements (Art. 6 of Land, Sea, P.O.W.; Art. 7 of Civilian) which is concerned with agreements between belligerents which may effect the rights of protected persons. Generally belligerents may not enter into special agreements which would impair the rights of protected persons. For additional discussion see Id. at 49-54.

80. Art. 8 of Land, Sea, P.O.W.; Art. 9 of Civilian Convention. The article is the same in each of the Conventions with the exception of the last sentence of the Land and Sea Conventions which does not appear in the P.O.W. or Civilians Conventions.

81. Commentaries, Supra note 35 at 60-1.

82. Greenspan, Supra note 66 at 525.

83. Art. 78 of P.O.W. Convention.

84. Art. 11 of Land, Sea, P.O.W. Conventions; Art. 12 of Civilian Convention.

85. Art. 72 of P.O.W. Convention.

86. Art. 12 and 13 of Land and Sea Conventions.

87. Art. 20 of Sea, Art. 17 of Land.

88. Art. 31 of Sea Convention.

89. Art. 37 of Sea Convention.

90. Art. 38 of Sea Convention.

91. Commentaries, Supra note 35 at 64-5.

92. Art. 10 of Land, Sea, P.O.W. Conventions, Art. 11 of Civilian Convention.

93. Commentaries, Supra note 35 at 75.

94. Greenspan, Supra note 66 at 407-08.

95. Law of Naval Warfare § 310.

96. There is some authority for the proposition that a reprisal can to a limited extent exceed the degree of violence committed by the belligerent against whom reprisals are taken, as long as the reprisal is measured by some degree of proportionality. However, this writer subscribes to the view expressed in the text. For a further discussion of the rule of proportionality see, 10 Whiteman, Digest of International Law 320 (1968).

97. Greenspan, Supra note 66 at 411.

98. McDougal and Feliciano, Law and Minimum World Public Order 684 (1961).

99. Id.

100. Navicerting was a system whereby ships were searched and their cargo certified as non-contraband prior to setting out on a voyage.

101. McDougal, Supra note 98 at 685 N. 483.

102. Pictet, New Geneva Conventions for The Protectionfof War Victims, 45 Am. J. Int'l L. 469-70 (1951).

103. Art. 50 of Land; Art. 51 of Sea; Art. 130 of P.O.W.; and Art. 147 of Civilian.

104. Draper, Red Cross Conventions 22 (1958).

105. Art. 49 Land; Art. 50 Sea; Art. 129 P.O.W.; and Art. 146 Civilian.

106. Gutteridge, Geneva Conventions of 1949, 26 Brit. Y.B. Int'l L. 305 (1949).

107. Art. 49 Land; Art. 50 Sea; Art. 129 P.O.W.; and Art. 146 Civilian.

108. Probably the best known case of an accused war criminal receiving assylum in a neutral country was that of the German Kaiser. The Treaty of Versailles, Art. 227, provided that the Kaiser should be tried "For a supreme offense against international morality and the sanctity of treaties." The Kaiser was never tried. He fled to Holland, received assylum, and the Dutch government refused to surrender him.

109. Draper, Supra note 104 at 22.

110. Gutteridge, Supra note 106 at 306.

111. Yingling, Supra note 75 at 426.

112. Art. 63 Land; Art. 62 Sea; Art. 142 P.O.W.; and Art. 158 Civilian.

113. Commentaries, Supra note 35 at 257.

114. Sohn, Cases on United Nations Law 52 (1967).

115. Westerman, A New Approach in Disseminating the Geneva Conventions. 45 Mil. L. Rev. 100 (July, 1969).

116. Draper, Supra note 104 at 36.

117. Mallison, U.S. Naval War College, International Law Studies for 1966, 12 (1968).

118. 2 Oppenheim, International Law 497 (7th ed., Lauterpacht 1952).

119. Art. 12 and 13 of Sea Convention. Art. 13(3) provides that "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" are protected by the Convention.

120. Compare Art. 13 Sea Convention with Art. 4 of P.O.W.

121. Draper, Supra note 104 at 74.

122. Commentaries, 96.

123. Draper, Supra note 104 at 76.

124. Commentaries, 90-2.

125. Id. 90.

126. Art. 12 Sea Convention.

127. Draper, Supra note 104 at 86; Commentaries 89.

128. Art. 4 Sea Convention.

129. Art. 16 Sea Convention.

130. Commentaries, 114-15.

131. Art. 16 Sea Convention.

132. The applicable provisions of the P.O.W. Convention provides that:

Article 12

> Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.
>
> Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.
>
> Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective

measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Article 13

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoners concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

Article 14

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confersqexcept insofar as the captivity requires.

Article 15

The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

Article 16

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction founded on similar criteria.

133. Tucker, U.S. Naval War College, International Law Studies for 1955, 116 (1957).

134. Commentaries, 115-16n.1; The decision to return refers to immediate return, because of operational or military necessity. There is no recorded instances of such action having taken place in World War I and II, Korea, or the Viet-Nam conflict. The immediate return of enemy personnel should not be confused with the repatriation of seriously wounded and sick prisoners of war under the P.O.W. Convention, there are numberous instances of such repatriations.

135. Art. 17 Sea Convention.

136. Art. 5 Sea Convention.

137. Commentaries, 113 N.2.

138. Id. 113-14; Art. 16 Sea Convention. The provision of the Convention (Art. 17) pertaining to landing of prisoners of war in a neutral country was intended to cover only such personnel that were intentionally landed by a belligerent warship. However, problems arise as to what should be done when armed forces of a belligerent are not intentionally landed, but are in the territory of a neutral as a result of the following fact situations: (1) belligerent warships navigating a neutral's territorial sea or calling at a neutral port and having P.O.W.'s aboard; (2) belligerent warship disarmed in a neutral port and having P.O.W.'s aboard; (3) neutral warship navigating a neutral's territorial sea or calling at a neutral port and having aboard armed forces of a country which is at war with another country; (4) neutral merchant vessel navigating a neutral s territorial sea or calling at a neutral port and having aboard armed forces of a country which is at war with another country; and (5) shipwrecked and escaped persons who reach neutral territory by their own means. As these problems are concerned with the international law of neutrality they are beyond the scope of this paper for a further discussion concerning these problems see, Convention Concerning the Rights and Duties of Neutral Powers in Naval Warfare (Thirteenth Hague Convention, 1907) 36 Stat. 2351, T.S. 542; and MacChesney, ALTMARK Incident and Modern Warfare - Innocent Passage in Wartime and the Right of Belligerents to Use Force to Redress Neutrality Violations. 52Nw. U.L. Rev. 320 (1957).

139. Art. 18 Sea Convention.

140. Commentaries, 131-32; Trial of Moehle, 9 Law Rep. Trials of War Criminals 75 (1949). For an excellent discussion of rescue zones and the Laconia case; where a German submarine captain set up a rescue zone so that survivors of the troopship Laconia could be rescued; see Mallison, Supra note 117 at 84-6.

141. Mallison, Supra note 117 at 139.

142. Trial of Moehle, Supra note 140 at 80. Trial of Eck (Peleus Trial) I Law Rpts. of Trials of War Criminals 16 (1947). One of the defenses the accused relied on in this case was that the killing of survivors of a torpedoes ship was required because of military and operational necessity.

143. Art. 27 Civilian Convention.

144. Art. 11, 37 Stat. 1658; T.S. 576 (1913).

145. 46 Stat. 2858, T.S. 830 (1930). The provisions of this Convention with the exception of Part IV, which relates to rules of international law regarding the operations of submarines and surface warships with respect to merchant vessels, expired on December 31, 1936. Under the terms of Article 23 Part IV, "Shall remain in force without limit of time."

146. 2 Oppenheim, International Law 474 (7th ed. Lauterpacht 1952).

147. Art. 20 Sea Convention.

148. Oppenheim, Supra note 146 at 502.

149. Commentaries, 148.

150. Art. 17 Land Convention would be applicable; it provides that:

Article 17

> Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination and if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.
>
> Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In cases of cremation the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.
>
> They shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organise at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of

the graves, and their possible transportation to the home country. These provisions shall likewise apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

As soon as circumstances permit, and at latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves, together with particulars of the dead interred therein.

151. Commentaries, 151.

152. Art. 19 Sea Convention.

153. Art. 123 P.O.W. Convention.

154. Commentaries, 142.

155. Art. 19 Sea Convention.

156. Art. 17 of P.O.W. Convention provides in part that, "No physical or mental torture, nor any form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

157. Greenspan, Law of Land Warfare, 105-06 (1959).

158. Commentaries, 146; Art's 136-141 of Civilian Convention requires a belligerent to forward to the adverse party the names of interned civilianspersonnel.

159. Commentaries, 144.

160. Art. 21 Sea Convention.

161. Commentaries, 153.

162. Draper, Red Cross Convention 78-79 (1958).

163. Levie, Penal Sanctions for Maltreatment of Prisoners of War, 56 Am. J. Int'l L. 453 (1962).

164. Law of Naval Warfare § 503 (c).

165. Stone, Legal Controls of International Conflict 675 (2nd ed. 1959).

166. Art. 32 Sea Convention.

167. Commentaries 187.

168. Art. 29 Sea Convention.

169. Art. 31 Sea Corvention.

170. Art. 24 Sea Convention. This article is applicable as to private hospital ships belonging to nationals of a belligerent. Art. 25 is applicable when a hospital ship belongs to nationals of a neutral State.

171. Commentaries, 166.

172. Art. 25 and 30 Sea Convention.

173. Art. 33 Sea Convention.

174. Commentaries, 188.

175. Mossop, Hospital Ships in The Second World War 24 Brit. Y.B. Int'l L. 404 (1947). For an excellent discussion of hasty conversions during World War II.

176. Art. 30 Sea Convention.

177. Art. 22 Sea Convention.

178. Commentaries, 191.

179. Art. 35 of Sea Convention, Also Art. 21 of Civilians Convention provides that "Vessels...conveying wounded and sick civilians, the infirm...shall be respected and protected.

180. Art. 31 Sea Convention.

181. Id.

182. Mossop, Supra note 175 at 403.

183. Art. 26 Sea Convention.

184. Art. 27 Sea Convention.

185. Commentaries, 170 and 172.

186. Art. 28 Sea Convention.

187. Commentaries, 175-76.

188. Art. 28 Sea Convention.

189. Stone, Legal Controls of International Conflict 678 (1959).

190. Art. 38 Sea Convention.

191. Commentaries, 213-14.

192. Id. 213.

193. Art. 36 Sea Convention.

194. Compare, Art. 28 Land Convention with Art. 37 Maritime Convention.

195. Art. 37 Sea Convention.

196. Art. 14 Sea Convention.

197. McDougal and Feliciano, Law and Minimum World Public Order 592-93 (1961).

198. Mossop, Supra note 175 at 405.

199. Art. 42 Sea Convention.

200. Commentaries, 239.

201. Art. 43 Sea Convention. See also, Art. 41 as to use of emblems other than the red cross.

202. Mossop, Supra note 175 at 402.

203. McDougal, Supra note 197 at 593.

204. Art. 44 Sea Convention.

205. Art. 45 Sea Convention.

206. Commentaries, 249-50.

207. Department of Defense Background Papers, Geneva Conventions 2 (Feb. 1955).

208. Id.

209. Id.

210. Id. at 5.

211. Report By The Secretary of Defense Advisory Committee on Prisoners of War, POW The Fight Continues After The Battle 8 (Aug. 1955).

[illegible]

[illegible]

[illegible]

212. Id. at 25.

213. Ball, Prisoner of War Negotiations, 21 Naval War College Rev. 62-63 (Sept. 1968).

214. Geneva Convention and the Treatment of Prisoners of War in Vietnam, 80 Harv. L. Rev. 851 (1967).

215. G.A. Res 217A, U.N. Doc. A/810 at 71-7 (1948).

216. McDougal, Supra note 197aat 88.

217. Geneva Convention and the Treatment of Prisoners of War in Vietnam, 80 Harv. L. Rev. 854 (1967).

218. Id.

219. McDougal, Supra note 197 at 89.

220. Geneva Convention and the Treatment of Prisoners of War in Vietnam, 80 Harv. L. Rev. 854-55 (1967).

221. Draper, Red Cross Conventions 105, (1958).

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